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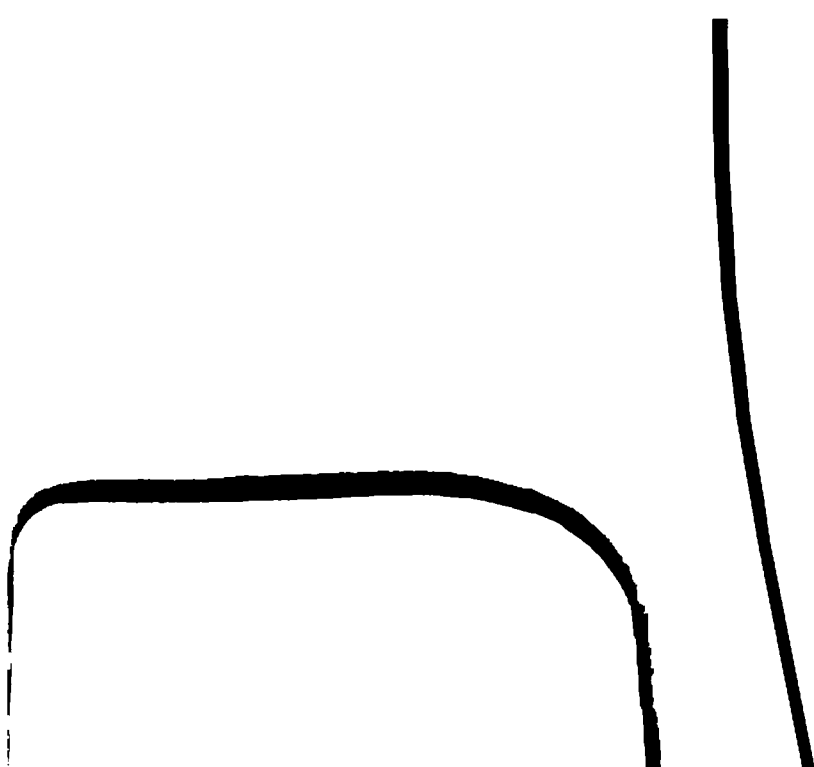
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DEDICATION.

TO THE HONORABLE WILLIAM T. WALLACE,

*Chief Justice of the Supreme Court of the State of California, as a
high appreciation in which are held his legal attainments and a
tributes, this Volume is respectfully inscribed, by the*

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PREFACE.

IN presenting this edition of the ANNOTATED PENAL CODE OF CALIFORNIA to the public the authors have little to say which was left unsaid in the prefaces to the Annotated Civil and Political Codes. We have endeavored to make this a *useful* book to the profession—prosecuting or defending—as well as to the Courts and officers of the law. As all enactments are to be found in this Code which prescribe punishments for violations of the laws contained in the other Codes, frequent references are made to them, especially the Political. Heretofore it was the practice of the legislative department to declare a public or private right, and in the same Act to affix a penalty for its violation—and so invariably with the declaration of wrongs. Under the system here adopted all the penal clauses of the law are congregated together, under appropriate headings, in the Penal Code, whilst the laws creating or recognizing “rights” are to be found in the Political or Civil Code, and sometimes in the Code of Civil Procedure; so, too, is it in occasional instances with the declaration or description of wrongs or injuries which are punishable criminally. It is to be hoped that this system and classification may never be departed from. In justice to the work we make an extract from the report of the Advisory Committee:

“The Advisory Committee on the Revision of the Laws have the honor to submit to you, and through you to the Legislature, their report upon the Penal Code.

“They have made a careful and critical examination of the Penal Code prepared by the Revision Commission. In doing so they have compared it, section by section, with our existing laws, and also with the Criminal Codes of some of the most

populous States. In the performance of this labor they have constantly consulted with the Commissioners and suggested such amendments as they deemed advisable.

“The Act of April fourth, eighteen hundred and seventy, providing for a Commission for the Revision of the Laws, requires the Commissioners to ‘correct verbal errors and omissions, and to suggest such improvements as will introduce precision and clearness into the wording of the statutes,’ and ‘to recommend all such enactments as shall, in the judgment of the Commission, be necessary to supply the defects of, and give completeness to, the existing legislation of the State.’

“In the preparation of the Penal Code, the Commissioners have strictly followed the direction of the law. While many sections of existing laws have been redrawn to correct verbal errors and to give them precision and clearness, their spirit and substance have, in all cases, been preserved. In a few instances terms of imprisonment have been changed, but such changes are confined to cases where there was an inequality in the period of punishment between crimes of a higher and lower grade. Many new sections have been introduced, but these were necessary to ‘supply the defects of and give completeness to the existing legislation of the State.’

“We believe that the bill for an Act to establish a Penal Code, as now prepared by the Commissioners, should be enacted into a law. No inconvenience can arise from its adoption, as full provision has been made for the punishment of offenses committed before it takes effect.

“Our thanks are due to the Commissioners for the courtesy they have extended to us, and for the readiness they have at all times manifested to aid us in our investigations. In the preparation of this Code they have earned and deserve the thanks of the legal profession and of the State.”

We also call attention to the report of the Legislative Committee, which concludes as follows:

“That it is exceedingly desirable to have a complete and harmonious system of laws which can easily be understood by all the citizens of the State, no one will deny. Your commit-

tee believe that this has been accomplished so far as the same is practicable, and therefore have reported the bill for an Act to establish a Penal Code to the Senate, and recommend to the Legislature that it pass. The States of Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, New Hampshire, and New Jersey, have already adopted a system of revised laws or codes. The States of Florida, Georgia, Illinois, Iowa, Michigan, Mississippi, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, West Virginia, and Wisconsin at the present time have employed skilled lawyers to revise or codify their laws. The necessity that exists for the performance of this work has been appreciated everywhere, and California should be, as it ever has been heretofore, among the first to take any step that tends toward improvement.

“Your committee believe that the system of law as embodied in the Penal Code prepared by the Revision Commission is more perfect than that prepared by any other State, and it would be well for the honor of California if by the action of the present Legislature it should adopt this great work, thus setting an example which will be speedily followed by all her sister States, adding new laurels to the fame which she has already so justly acquired, and at once becoming, as has been remarked, not only a lawgiver to the thousands within her borders, but to the millions who are to succeed them, and by the force of her example to not only the vast population of the whole Pacific Coast, but to the millions of citizens of other States, who will soon follow in her footsteps. Then, when the laws of all the States in this great Federation are harmonious and in sympathy with each other, California, having made the first advance toward this high aim, will be entitled to the first post of honor and to the gratitude of the whole country.”

The language of these two reports cannot be mistaken; they favor the system which these Codes present. Their fair trial is solicited.

CREED HAYMOND,
JOHN C. BURCH.

SACRAMENTO CITY, October 10th, 1872.

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NOTE.

The Catalogue of Abbreviations and explanations thereof, in Volume I of THE CIVIL CODE, must be used in connection with the authorities and decisions referred to in this.

THE
PENAL CODE
OF
CALIFORNIA.

IN THREE PARTS.

THE
PENAL CODE
OF
CALIFORNIA.

AN ACT
TO
ESTABLISH A PENAL CODE.

[Approved February 14th, 1872.]

*The People of the State of California, represented in
Senate and Assembly, do enact as follows:*

TITLE OF THE ACT.

1. This Act shall be known as THE PENAL CODE OF CALIFORNIA, and is divided into Three Parts, as follows:

Title and
Divisions of
this Act.

- I.—OF CRIMES AND PUNISHMENTS.
- II.—OF CRIMINAL PROCEDURE.
- III.—OF THE STATE PRISON AND COUNTY JAILS.

THE PENAL CODE

OF

CALIFORNIA.

PRELIMINARY PROVISIONS.

SECTION 2. When this Act takes effect.

3. Not retroactive.
4. Construction of the Penal Code.
5. Provisions similar to existing laws, how construed.
6. Effect of Code upon past offenses.
7. Certain terms defined in the senses in which they are used in this Code.
8. What intent to defraud is sufficient.
9. Civil remedies preserved.
10. Proceedings to impeach or remove officers and others preserved.
11. Authority of Courts-martial preserved. Courts of justice to punish for contempts.
12. Of sections declaring crimes punishable. Duty of Court.
13. Punishments, how determined.
14. Witness testimony may be read against him on prosecution for perjury.
15. "Crime" and "public offense" defined.
16. Crimes, how divided.
17. Felony and misdemeanor defined.
18. Punishment of felony, when not otherwise prescribed.
19. Punishment of misdemeanor, when not otherwise prescribed.
20. To constitute crime there must be unity of act and intent.
21. Intent, how manifested, and who considered of sound mind.
22. Drunkenness no excuse for crime. When it may be considered.

SECTION 23. Certain statutes specified as continuing in force.

24. This Act, how cited.

When this
Act takes
effect.

2. This Code takes effect at twelve o'clock, noon, on the first day of January, eighteen hundred and seventy-three.

Not
retroactive.

3. No part of it is retroactive, unless expressly so declared.

NOTE.—Von Schmidt vs. Huntington, 1 Cal., p. 55; Thorne vs. San Francisco, 4 Cal., p. 127; Gates vs. Salmon, 28 Cal., p. 320; Bensley vs. Ellis, 39 Cal., p. 309; Prince vs. United States, 2 Gall., p. 204; United States vs. Heth, 3 Cranch, p. 399; Harvey vs. Tyler, 2 Wall., p. 328; Holden vs. James, 11 Mass., p. 396; Lewis vs. Webb, 3 Greenl., p. 326; Dash vs. Van Kleeck, 7 John., p. 474; Lewis vs. Brackenridge, 1 Black., p. 220; Smith's Commentaries, Sec. 533.

Construc-
tion of the
Penal Code

4. The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.

NOTE.—It is a rule of law that penal statutes are to be strictly construed.—1 Bl. Com., p. 88; 1 Kent's Com., p. 467. Thus a statute, enacting that a person convicted of stealing *horses* should not have the benefit of clergy, was held not to extend to a person who stole but one *horse*.—1 Bl. Com., p. 88. And a statute which made the stealing of sheep or other cattle a felony without the benefit of clergy, was held to extend to nothing but sheep stealing, the words, "or other cattle," being looked upon as much too loose to create a capital offense.—Id. However sound may be the arguments in favor of this rule, when applied to ordinary Acts of the Legislature, it is apparent that it would be improper to apply it in all its severity to a system of laws intended, in a great measure, to take the place of the common law, and having in view, as its leading object, the furtherance of justice and a disregard of technical strictness. The provisions of such a system ought to be construed in the same manner, and with like force and effect, as they would be were the principles enunciated resting in the unwritten law, and it was to this end that a section of similar import has

4. The rule of the Common Law, that penal statutes should receive strict construction in favor of him upon whom a penalty was to be inflicted, has been abrogated by the Code, which has constituted itself, in this respect, its own interpreter. *Ex parte Gutierrez*, 45 Cal. 429.

People v. Mortimer
Apr 20 1873.

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5. The provisions of this Code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments.

6. No act or omission, commenced after twelve o'clock noon of the day on which this Code takes effect as a law, is criminal or punishable, except as prescribed or authorized by this Code, or by some of the statutes which ^{*(the code)*} it specifies as continuing in force and as not affected by its provisions, or by some ordinance, municipal, county, or township regulation, passed or adopted, under such statutes and in force when this Code takes effect. Any act or omission commenced prior to that time may be inquired of, prosecuted, and punished in the same manner as if this Code had not been passed.

Provisions similar to existing laws, how construed.

Effect of Code upon past offences.

People
as
shortened
apt June 1873.
These crimes com-
mitted before adop-
tion of Code can
be tried under
this code.

NOTE.—ABOLITION OF COMMON LAW OFFENSES.—
 Sec. 143 of the Crimes and Punishment Act of eighteen hundred and fifty (Stats. 1850, p. 229), as amended March thirty-first, eighteen hundred and sixty-six (Stats. 1866, p. 468), among other things declares that “every act or offense not defined by statute which is a misdemeanor at common law, is a misdemeanor in this State.” This amendment added to the confusion already existing in our criminal laws, so that at the time of the adoption of this Code an examination of more than six thousand statutes, and the whole body of the common law, was necessary before it could be determined what acts or omissions were penal. Every one is presumed to know the law; yet, under the system then existing in this State, such knowledge was as unattainable by the masses as it would have been were the laws “written in small character upon high pillars.” It may well be doubted whether a State has the moral right to hold the citizen responsible for an act or

omission, not evil within itself, which act or omission it is impossible for the citizen to know is prohibited by law. At least, it is clearly the duty of the State to give to every citizen ready means by which a knowledge of the penal laws may be attained. To this end, under the Title of "Crimes and Punishments," has been brought every act or omission made punishable. The difficulties encountered may be illustrated by the following instances: The revenue laws contain more than fifty penal clauses; the election laws more than thirty; the corporation laws more than twenty; and at least seven out of ten of the general Acts contain provisions of a penal character. Through all these various Acts the Commissioners extended their examination, drew from them their penal clauses and inserted them—pruned of redundant and contradictory matter—in the Penal Code, under appropriate subdivisions.

EFFECT OF THE CODE UPON ANTERIOR OFFENSES.—In so far as this Code declares acts criminal which heretofore have not been so regarded, or increases the severity, or changes the kind of punishment inflicted, for a crime defined by our former laws, the familiar provision of the Federal Constitution prohibiting ex post facto laws, forbids that it be made applicable to acts committed before it takes effect.—U. S. Const., Art. 1, Sec. 10, Subd. 1; *Calder vs. Bull*, 3 Dall., p. 386; *Fletcher vs. Peck*, 6 Cr., pp. 87, 138. In so far as it *diminishes* the severity of the punishment by prescribing a less amount or duration of penalty of the same kind with that inflicted under the former law, there may be no constitutional reason to prevent its being made applicable to all offenses, irrespective of the date of commission.—*Hartung vs. People*, 22 N. Y., p. 95; *Commonwealth vs. Mott*, 21 Pick., p. 492; *Keene vs. State*, 3 Chandl., p. 109. Ameliorations of punishment introduced by statute are often expressly extended to prior offenses. No natural right arises, however, in behalf of an offender to claim the benefit of a subsequent statute mitigating the penalty for offenses like his own, though clemency readily awards it to him. Convenience and simplicity in the administration of penal justice should control upon this point. The Commissioners were of opinion that any attempt by general words to render such mitigations of punishment as are introduced by the Code, applicable to antecedent offenses, is calculated to raise nice and embarrassing questions as to whether a given modification is

a mitigation or not. They observe that it has been held that the judiciary cannot determine ~~whether~~ a provision that no person convicted of a capital offense shall be executed until after a year's confinement, nor then except upon special warrant from the Governor—is or is not less severe than a former law imposing absolutely the punishment of death.—Hartung vs. People, 22 N. Y., pp. 95, 106. Also, that a substitution of imprisonment, not exceeding seven years, for whipping, has been held not an increase of punishment.—Strong vs. State, 1 Blackf., p. 193; Herber vs. State, 7 Tex., p. 69. They, therefore, recommended that, as it is necessary to retain the former system of prohibitions and penalties to a great extent, as respects acts already committed, it be retained complete, and applied to all acts committed before the hour at which this Code takes effect. If a criminal statute is changed between the time of the commission of an offense and conviction, but contains a saving clause to the effect that the change shall not apply to the trial of offenses committed prior to such change, the punishment is regulated by the old law.—People vs. Gill, 7 Cal., p. 356.

7. Words used in this Code in the present tense include the future as well as the present; words used in the masculine gender include the feminine and neuter; the singular number includes the plural, and the plural the singular; the word person includes a corporation as well as a natural person; writing includes printing; oath includes affirmation or declaration; and every mode of oral statement under oath or affirmation is embraced by the term “testify,” and every written one in the term “depose;” signature or subscription includes mark, when the person cannot write, his name being written near it, and witnessed by a person who writes his own name as a witness. The following words, also, have in this Code the signification attached to them in this section, unless otherwise apparent from the context:

Certain terms defined in the senses in which they are used in this Code.

1. The word “willfully,” when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage;

2. The words “neglect,” “negligence,” “negligent,” and “negligently,” import a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in

Same.

3. The word "corruptly" imports a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person;

4. The words "malice" and "maliciously" import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law;

5. The word "knowingly" imports only a knowledge that the facts exist which bring the act or omission within the provisions of this Code. It does not require any knowledge of the unlawfulness of such act or omission;

6. The word "bribe" signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his action, vote, or opinion, in any public or official capacity;

7. The word "vessel," when used with reference to shipping, includes ships of all kinds, steamboats, canals, boats, barges, and every structure adapted to be navigated from place to place for the transportation of merchandise or persons;

8. The words "peace officer" signify any one of the officers mentioned in section eight hundred and seven-
teen of this Code;

9. The word "magistrate" signifies any one of the officers mentioned in section eight hundred and eight of this Code;

10. The word "property" includes both real and personal property;

11. The words "real property" are coextensive with lands, tenements, and hereditaments;

12. The words "personal property" include money, goods, chattels, things in action, and evidences of debt.

13. The word "month" means a calendar month, unless otherwise expressed;

14. The word "will" includes codicils;

15. The word "writ" signifies an order or precept in writing, issued in the name of the people, or of a Court or judicial officer, and the word "process" a writ or summons issued in the course of judicial proceedings.

16. Words and phrases must be construed according ^{Same.} to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, must be construed according to such peculiar and appropriate meaning;

17. Words giving a joint authority to three or more public officers or other persons, are construed as giving such authority to a majority of them, unless it be otherwise expressed in the act giving the authority;

18. When the seal of a Court or public officer is required by law to be affixed to any paper, the word "seal" includes an impression of such seal upon the paper alone, or upon any substance attached to the paper capable of receiving a visible impression. The seal of a private person may be made in like manner, or by the scroll of a pen, or by writing the word "seal" against his name;

19. The word "State," when applied to the different parts of the United States, includes the District of Columbia and the Territories, and the words "United States" may include the District and Territories.

20. The word "State," when applied to the different parts of the United States, includes the District of Columbia and the Territories, and the words "United States" may include the District and Territories.

19. Where the term "person" is used in this Code to designate the party whose property may be the subject of any offense, it includes this State, any other State, government, or country which may lawfully own any property within this State, and all public and private corporations or joint associations, as well as individuals.

20. The word "person" includes bodies politic and corporate.

21. The singular number includes the plural, and the plural the singular.

Same.

22. Words used in the masculine gender comprehend, as well, the feminine and neuter.

23. Words used in the present tense include the future, but exclude the past.

24. The word "will" includes codicils.

25. Words and phrases must be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, must be construed according to such peculiar and appropriate meaning.

26. Words giving a joint authority to three or more public officers or other persons, are construed as giving such authority to a majority of them, unless it be otherwise expressed in the act giving the authority.

NOTE.—Taken partly from Rev. Laws of Mass., 1858, Chap. 3, Sec. 7; Rev. Laws of Iowa, 1860, Chap. 3, Sec. 29; N. Y. P. C., Secs. 762 to 781, inclusive.

What
intent to
defraud is
sufficient.

8. Whenever, by any of the provisions of this Code, an intent to defraud is required in order to constitute any offense, it is sufficient if an intent appears to defraud any person, association, or body politic or corporate, whatever.

Civil
remedies
preserved.

9. The omission to specify or affirm in this Code any liability to damages, penalty, forfeiture, or other remedy imposed by law and allowed to be recovered or enforced in any civil action or proceeding, for any act or omission declared punishable herein, does not affect any right to recover or enforce the same.

Proceed-
ings to
impeach or
remove
officers and
others
preserved.

10. The omission to specify or affirm in this Code any ground of forfeiture of a public office, or other trust or special authority conferred by law, or any power conferred by law to impeach, remove, depose, or suspend any public officer or other person holding any trust, appointment, or other special authority conferred by law, does not affect such forfeiture or power,

or any proceeding authorized by law to carry into effect such impeachment, removal, deposition, or suspension.

11. This Code does not affect any power conferred by law upon any Court Martial, or other military authority or officer, to impose or inflict punishment upon offenders; nor any power conferred by law upon any public body, tribunal, or officer, to impose or inflict punishment for a contempt.

Authority
of Courts-
martial
preserved.

Courts of
justice to
punish for
contempts.

12. The several sections of this Code which declare certain crimes to be punishable as therein mentioned, devolve a duty upon the Court authorized to pass sentence, to determine and impose the punishment prescribed.

Of sections
declaring
crimes
punishable

Duty of
Court.

13. Whenever in this Code the punishment for a crime is left undetermined between certain limits, the punishment to be inflicted in a particular case must be determined by the Court authorized to pass sentence, within such limits as may be prescribed by this Code.

Punish-
ments, how
determined

14. The various sections of this Code which declare that evidence obtained upon the examination of a person as a witness cannot be received against him in any criminal proceeding, do not forbid such evidence being proved against such person upon any proceedings founded upon a charge of perjury committed in such examination.

Witness'
testimony
may be
read
against
him on
prosecution
for perjury.

15. A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments:

"Crime"
and
"public
offense"
defined.

1. Death;
2. Imprisonment;
3. Fine;

4. Removal from office; or,
5. Disqualification to hold and enjoy any office of honor, trust, or profit in this State.

NOTE.—The use of the terms, “crime,” “felony,” “misdemeanor,” and “offense,” is far from uniform even among legal writers. “A crime, or misdemeanor,” says Blackstone, “is an act committed or omitted in violation of a public law, either forbidding or commanding it.” “Crimes and misdemeanors, properly speaking, are synonymous terms; though in common usage, the word ‘crime’ is made to denote such offenses as are of a deeper and more atrocious dye.” “Misdemeanor,” says Christian, “is generally used in contradiction to felony; and misdemeanors comprehend all indictable offenses, which do not amount to felony.”—Note to 4 Bl. Com., p. 5. “Misdemeanor,” says Chitty, “means every offense inferior to felony, but punishable by indictment, or by particular prescribed proceedings. The term ‘offense’ is usually understood to be a crime *not indictable*, but *punishable summarily*, or by the forfeiture of a *penalty*.”—1 Gen. Pr., p. 14. “A crime,” says Bell, “may be defined to be any act done in violation of those duties which an individual owes to the community, and for a breach of which the law has provided that the offender shall make satisfaction to the public.”—Dict. L. of Scot., Tit. Crime. Bishop defines crimes as “those wrongs which the Government notices as injurious to the public, and punishes in what is called a criminal proceeding, in its own name.”—1 Cr. L., Sec. 43. “The word crime,” says Chief Justice Savage, of New York, speaking of the clause in the Federal Constitution which provides for the extradition of persons charged with *treason, felony, or other crime*, “is synonymous with misdemeanor, and includes every offense below felony punishable by indictment as an offense against the public.”—Matter of Clark, 9 Wend., pp. 212, 222. “The term *misdemeanor*,” says the same Judge, in another case, “is used in contradistinction to *felony*, and comprehends all indictable offenses which do not amount to felony.”—*Don vs. People*, 12 Wend., p. 314. The definition of the section is based upon the usage which has grown up in this State of employing “crime” and “offense” in the extensive signification, and confining “felony” and “misdemeanor” to denote the classes into which crimes are divided, and is in

substantial accord with the definition given by Mr. Livingston.—Crim. Code, Art. 75.;

16. Crimes are divided into:

1. Felonies; and,
2. Misdemeanors.

Crimes,
how
divided.

17. A felony is a crime which is punishable with death or by imprisonment in the State Prison. Every other crime is a misdemeanor. When a crime punishable by imprisonment in the State Prison is also punishable by fine or imprisonment in a county jail, in the discretion of the Court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the State Prison. (Approved March 7th, 1874. Sixty days.)

Felony and
misdemeanor
defined.

—Chitty's Practice, p. 14; 1 Hawk. P. C., p. 37; 5 Wheat., p. 159. "Smaller faults, and omissions of less consequence, are comprised under the gentler names of misdemeanors only."—4 Bl. Com., p. 5; see note to Sec. 16.

18. Except in cases where a different punishment is prescribed by this Code, every offense declared to be a felony is punishable by imprisonment in the State Prison, not exceeding five years.

Punishment of
felony,
when not
otherwise
prescribed.

19. (§ 143.) Except in cases where a different punishment is prescribed by this Code, every offense declared to be a misdemeanor is punishable by imprisonment in a County Jail not exceeding six months, or by a fine not exceeding five hundred dollars, or by both.

Punishment of
misdemeanor,
when not
otherwise
prescribed.

20. (§ 1.) In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence.

To constitute crime
there must
be unity of
act and
intent.

NOTE.—In the People vs. Harris, 29 Cal., p. 679, the defendant was indicted for voting twice at the general election held on the 6th of September, 1865. To the indictment he pleaded not guilty. Upon the trial he was found guilty, and sentenced to be imprisoned in the State Prison for one year. It was provided by

statute that any person who shall vote more than once at any one election shall be deemed guilty of a felony, and, upon conviction, shall be imprisoned in the State Prison for a term not less than one year nor more than five years.—Laws 1858, pp. 165, 166.

The evidence showed that the defendant voted at the election polls of the Fifth District of San Francisco at about ten o'clock in the forenoon of the day above mentioned, when his right to vote was challenged on the ground that he was not a resident of the district. The challenge being withdrawn the defendant voted. About two or three o'clock in the afternoon the defendant returned to the same polls very much intoxicated, and again offered to vote. The same person who had challenged his right to vote at that place in the morning informed him that he had voted before, and that he would get himself in trouble if he voted again. The defendant, in reply, vehemently protested that he had not voted, and declared his willingness to so make oath. The oath prescribed by the statute was then administered to him by the proper officer, to which he responded in the affirmative, and then voted the second time.

When the cause was submitted to the jury the Court charged them as follows: "The indictment charges that the defendant at an election for members for the State Senate and Assembly, held on the 6th day of September, 1865, in the Fifth Election District of this city and county, did knowingly, unlawfully, and feloniously vote more than once at the same election. The language of the statute upon which the indictment is framed is, 'any person who shall vote more than once at any election * * * shall be deemed guilty of a felony.' The word *knowingly* is not in the statute, and although used in the indictment, yet it may be rejected as surplusage, for the State is not bound to support by proof the allegation in the indictment, that the act of double voting was knowingly done. The statute makes the act of voting more than once at the same election, and not the act of voting knowingly more than once at any election, a crime. If, therefore, you are satisfied from the testimony in the case that the defendant, at an election for members of the State Senate and Assembly, held on the 6th day of September, 1865, in the Fifth Election District, in this city and county, voted twice, then, although the defendant may at the time have been under the influence of intoxicating liquors, it is your duty to bring in a verdict of guilty against him;

for drunkenness is no excuse or justification for the commission of a criminal act, and evidence of voluntary intoxication is properly admissible as affecting crime only in those cases in which it is necessary to ascertain whether the accused was in a mental condition which enabled him to form a deliberately premeditated purpose, and this is not one of those cases. The counsel for the defendant requests me to charge you that every crime involves a union of act and intent, or criminal negligence. This is true. The law does not punish a man for his intention, nor for his act disconnected from his intention, but act and intent must unite to constitute a crime."

At the conclusion of the charge the counsel for the defendant requested the Court to withdraw that portion of it which stated that the act of double voting need not be knowingly done, which the Court declined to do. The defendant's counsel excepted to each and every portion of the charge except that given at the request of the defendant's counsel, and also excepted to the refusal of the Court to withdraw the portion of the charge which stated that the act of double voting need not be knowingly done. The defendant's counsel asked for a reversal of the judgment, on the ground that the jury were misdirected by the Court in relation to the knowledge which it was necessary the defendant should have as to what he had done and was doing when he voted the second time, and he insists that the error of the charge was not cured by the instructions given at the defendant's request, "that every crime involves a union of act and intent or criminal negligence."

The Court said: "The theory upon which it was sought to exculpate the defendant of criminality was that he was in such a condition, mentally, when he voted the second time, as not to know that he had already voted, but, on the contrary, believed that he had not done so. It is laid down in the books on the subject, that it is a universal doctrine that to constitute what the law deems a crime there must concur both an evil act and an evil intent. *Actus non facit reum nisi mens sit rea.*—1 Bish. on Cr. Law, Secs. 227, 229; 3 Greenl. Ev., Sec. 13. Therefore the intent with which the unlawful act was done must be proved as well as the other material facts stated in the indictment; which may be by evidence either direct or indirect, tending to establish the fact, or by inference of law from other facts

proved. When the act is proved to have been done by the accused, if it be an act in itself unlawful, the law in the first instance presumes it to have been intended, and the proof of justification or excuse lies on the defendant to overcome this legal and natural presumption.—3 Greenleaf's Ev., Secs. 13, 14, 18. Now, when the statute declares the act of voting more than once at the same election by the same person to be a felony, it must be understood as implying that the interdicted act must be done with a criminal intention, or under circumstances from which such intention may be inferred. The defendant's counsel, at the trial, seems to have apprehended the true rule of law on the subject, and to have regarded the burden as on the defendant to show by evidence that the act of his voting the second time was not criminal, and for this purpose evidence of his intoxicated and excited condition was submitted to the jury, in order that they might determine under the rules of law governing in such cases whether the defendant was conscious at the time of having voted before at the same election. The question was fairly before the jury whether the defendant knew what he was about when he voted the second time. From the evidence in the case it appears he was very much intoxicated, but whether to a degree sufficient to deprive him of all knowledge of having already voted, was for the jury to decide.

“The law does not excuse a person of a crime committed while in a state of voluntary intoxication. In *Rex vs. Thomas*, 7 Car. & Payne, p. 817, Parke, B., said to the jury: ‘I must tell you that if a man makes himself voluntarily drunk, it is no excuse for any crime he may commit whilst he is so; he takes the consequences of his own voluntary act, or most crimes would go unpunished;’ and to the same effect is the language of Alderson, B., in *Rex vs. Meakin*, 7 Car. & Payne, p. 297; and in harmony with this doctrine is the whole current of English authority. (1 Whar. Cr. Law, Sec. 39) Mr. Wharton says that in this country the same position has been taken with marked uniformity, it being invariably held that voluntary drunkenness is no defense to the *factum* of guilt; the only point about which there has been any fluctuation being the extent to which evidence of drunkenness is receivable to determine the exactness of the intent or extent of deliberation.—Id., Sec. 40. In *Bigman vs. The State*, 14 Ohio, p. 555, it was held that a man who passes counterfeit money is not criminally liable if he is so drunk as to be incapable of knowing that it is counterfeit, and conse-

quently of entertaining the intention to defraud, provided there was no ground to suppose he knew the money to be counterfeit before then; and in *Swan vs. The State*, 4 Humph., pp. 136, 141, the Supreme Court of Tennessee said: 'Although drunkenness, in point of law, constitutes no excuse or justification for crime, still, when the nature and essence of a crime is made by law to depend upon the peculiar state and condition of the criminal's mind at the time, and with reference to the act done, drunkenness as a matter of fact affecting such state and condition of the mind is a proper subject for consideration and inquiry by the jury. The question in such case is, what is the mental status?' In *Reg. vs. Moore*, 3 Car. & Kir., p. 319, the defendant was indicted for an attempt to commit suicide by drowning, and in defense it was alleged she was unconscious from drunkenness at the time of the nature of the act. The Court was of the opinion that if she was so drunk as not to know what she was about, the jury could not find that she intended to destroy herself.—*Reg. vs. Cruse*, 8 Car. & Payne, p. 546; *United States vs. Rondenbush*, 1 Bald., p. 517; *Kelly vs. The State*, 3 Sm. & Marsh., p. 518; *Pirtle vs. The State*, 9 Humph., p. 663; *Haile vs. The State*, 11 Humph., p. 154.

"While the condition of the accused, caused by drunkenness, may be taken into consideration by the jury with the other facts of the case, to enable them to decide in respect to the question of intent, it is proper to observe that drunkenness will not excuse crime.—*People vs. King*, 27 Cal., p. 514. The inquiry to be made is, whether the crime which the defendant is accused of having committed *has in point of fact been committed*, and for this purpose whatever will fairly and legitimately lead to the discovery of the mental condition and status of the accused at the time, may be given in evidence to the jury, and may be considered by them in determining whether the defendant was in fact guilty of the crime charged against him. Great caution is necessary in the application of this doctrine, and those whose province it is to decide in such cases should be satisfied beyond a reasonable doubt, from all the facts and circumstances before them, that the unlawful act was committed by the accused when his mental condition was such that he did not know that he was committing a crime, and also that no design existed on his part to do the wrong before he became thus incapable of knowing what he was doing.

"We have said more respecting the character of the defense, or excuse imposed, than would have been neces-

sary, but for the reason that it is important that those who may be guilty of violating the law may understand that a state of intoxication can be of no avail as an excuse for crime.

“The Court told the jury, as we have seen, that the statute makes the act of voting more than once at the same election, and not the act of voting knowingly—that is, intentionally—more than once at any one election, a crime. The Court further charged the jury, in substance, that evidence of voluntary intoxication is properly admissible as affecting crime only in those cases in which it is necessary to ascertain whether the accused was in a mental condition which enabled him to form a deliberate premeditated purpose to commit the offense; but in the same connection the jury were told, in effect, that the case before them was not one of those cases in which the defendant could interpose the defense that he was intoxicated to a degree rendering him unconscious of what he had done, and of the wrong which he was doing. The Court then instructed the jury, at the request of the defendant’s counsel, that every crime involves a union of act and intent or criminal negligence. That the law does not punish a man for his intention, but that act and intent must unite to constitute a crime; but at the same time the Court refused to modify in any degree the charge already given, though especially requested so to do.

“Taking these two portions of the charge together we may understand the Court as declaring:

“*First*—That a crime is constituted by the commission of a forbidden act, united with a felonious intent on the part of him who does the act or caused it to be done.

“*Second*—That the act of voting more than once at the same election was a crime, even though not done with knowledge on the part of him who so votes that he was voting the second time.

“*Third*—That the case before the jury was not one in which the defendant could show that by reason of his intoxicated condition he did not know what he was doing when he voted the second time.

“We do not see how these charges, involving the question of felonious knowledge or intention, can be harmonized. The second and third stand in direct antagonism to the first, and the greater prominence was given to the one of which the defendant complains, and which we think to be erroneous. We are of the opinion the Court erred also in excluding from the jury any consideration of the mental status of the defendant by

reason of his intoxicated condition when he voted the second time.

“The judgment is reversed and a new trial ordered.”

The opinion of the Court in the *People vs. Harris* is given at length because it is a correct and authoritative exposition of Sec. 20; see, also, Sec. 22. Says Mr. Bishop (1 Bishop's Cr. Law, Sec. 227): “There is only one criterion by which the guilt of men is to be tested. It is whether the mind is criminal. Criminal law relates only to crime, and neither in philosophical speculation nor in religious or moral sentiment would any people in any age allow that a man should be deemed guilty unless his mind were so. It is, therefore, a principle of our legal system, as probably of every other, that the essence of an offense is the wrongful intent, without which it cannot exist.” The opinion of Mr. Bishop finds full support in the following adjudged cases.—*United States vs. Pearce*, 2 McLean, p. 14; *Weaver vs. Ward*, Hob., p. 134; *Rex vs. Fell*, 1 Salk., p. 272; *Lancaster's Case*, 1 Leon., p. 208; *State vs. Nicholus*, 2 Strob., p. 278; *State vs. Berkshire*, 2 Cart. Ind., p. 207; *State vs. Bartlett*, 30 Maine, p. 132; *Commonwealth vs. Ridgeway*, 2 Ash., p. 247; *Rex vs. O'Brian*, 7 Mod., p. 378; *Cummins vs. Spruance*, 4 Harring., Del., p. 315; *Case of Le Tigre*, 3 Wash. C. C., p. 567; *State vs. Hawkins*, 8 Port., p. 461. “By reference to the intention, we inculcate or exculpate others or ourselves, without any reference to the happiness or misery actually produced. Let the result of an action be what it may, we hold a man guilty simply on the ground of intention; or, on the same ground we hold him innocent.”—*Wayland Moral Science*, p. 12.

21. (§§ 2, 3.) The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity.

Intent, how manifested, and who considered of sound mind.

NOTE.—The natural and probable consequences of every act deliberately done are presumed to have been intended by the author of the act, if of sane mind.—*Wharton's Am. Law*, Secs. 712, 944; *Com. vs. Drew*, 4 Mass., p. 391; *People vs. Herrick*, 13 Wend., p. 87; *Miller vs. People*, 5 Barb., p. 203; *People vs. Cotterall*, 18 Johns., p. 115; *State vs. Cooper*, 1 Green, N. J., p. 361; *State vs. Mitchell*, 5 Ired., p. 350; *State vs. Jarrott*, 1 Ired., p. 76; *Com. vs. Snelling*, 15 Pick., p. 387;

2 Russ on Crimes, p. 231; 1 Greenleaf on Evidence, Sec. 18; Wharton on Homicide, pp. 34, 39; State vs. Zeller, 2 Halsted, p. 220; State vs. Merrill, 2 Dev., p. 269; State vs. Peters, 2 Rice's Dig., p. 106; Wood-sides vs. State, 2 Howard, Miss., p. 656; People vs. Clark, 3 Selden, p. 385; People vs. Kirby, 2 Parker C. R., p. 28; Mitchum vs. State, 11 Georgia, p. 615; Com. vs. Webster, 5 Cush., p. 535. The intent with which an unlawful act was done must be proved, but when an unlawful act is proved the law presumes it to have been intended.—People vs. Harris, 29 Cal., p. 678. A malicious and guilty intent is conclusively presumed from the deliberate commission of an unlawful act for the purpose of injuring another.—Code of Civil Procedure, Sec. 1962, Subd. 1. That an unlawful act was done with an unlawful intent is presumed, but this presumption may be controverted by other evidence.—Code of Civil Procedure, Sec. 1963, Subd. 2.

Drunken-
ness no
excuse for
crime.

When it
may be
considered.

22. (§ 8.) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act.

NOTE.—People vs. Rogers, 18 N. Y., p. 9; People vs. Hammill, 2 Park. Cr., p. 223; People vs. Robinson, 2 Park. Cr., p. 235; Kenny vs. People, 27 How. Pr., p. 202; People vs. Belencia, 21 Cal., p. 545; People vs. King, 27 Cal., p. 514; People vs. Harris, 29 Cal., p. 681; Pirkle vs. State, 9 Humph., p. 663.

Certain
statutes
specified as
continuing
in force.

23. Nothing in this Code affects any of the provisions of the following statutes, but such statutes are recognized as continuing in force, notwithstanding the provisions of the Codes, except so far as they have been repealed or affected by subsequent laws:

1. All Acts incorporating or chartering municipal corporations, and Acts amending or supplementing such Acts.

2. All Acts consolidating cities and counties, and ^{Same.} Acts amending or supplementing such Acts.

3. All Acts for funding the State debt, or any part thereof, and for issuing State bonds, and Acts amending or supplementing such Acts.

4. All Acts regulating and in relation to rhodeos. —

5. All Acts in relation to Judges of the Plains.

6. All Acts creating or regulating Boards of Water Commissioners and Overseers in the several townships or counties of the State.

7. All Acts in relation to a branch State Prison.

8. An Act for the more effectual prevention of cruelty to animals, approved March thirtieth, eighteen hundred and sixty-eight.

9. An Act for the suppression of Chinese houses of ill-fame, approved March thirty-first, eighteen hundred and sixty-six.

10. An Act relating to the Home of the Inebriate of San Francisco, and to prescribe the powers and duties of the Board of Managers and the officers thereof, approved April first, eighteen hundred and seventy.

11. An Act concerning marks and brands in the County of Siskiyou, approved March twentieth, eighteen hundred and sixty-six.

12. An Act to prevent the destruction of fish in the waters of Bolinas Bay, in Marin County, approved March thirty-first, eighteen hundred and sixty-six.

13. An Act concerning trout in Siskiyou County, approved April second, eighteen hundred and sixty-six.

14. An Act to prevent the destruction of fish in Napa River and Sonoma Creek, approved January twenty-ninth, eighteen hundred and sixty-eight.

15. An Act to prevent the destruction of fish and game in, upon, and around the waters of Lake Mer-

Same. ritt or Peralta, in the County of Alameda, approved March eighteenth, eighteen hundred and seventy.

16. An Act to regulate salmon fisheries in Eel River, in Humboldt County, approved April eighteenth, eighteen hundred and fifty-nine.

17. An Act for the better protection of stock raisers in the Counties of Fresno, Tulare, Monterey, and Mariposa, approved March twentieth, eighteen hundred and sixty-six.

18. An Act concerning oysters, approved April twenty-eighth, eighteen hundred and fifty-one.

19. An Act concerning oyster beds, approved April second, eighteen hundred and sixty-six.

20. An Act concerning gas companies, approved April fourth, eighteen hundred and seventy.

**This Act,
how cited.**

24. This Act, whenever cited, enumerated, referred to, or amended, may be designated simply as THE PENAL CODE, adding, when necessary, the number of the section.

PART I.

OF CRIMES AND PUNISHMENTS.

PART I.

OF CRIMES AND PUNISHMENTS.

TITLE I.

OF PERSONS LIABLE TO PUNISHMENT FOR CRIME.

SECTION 26. Who are capable of committing crimes.

27. Who are liable to punishment.

26. All persons are capable of committing crimes except those belonging to the following classes:

Who are
capable of
committing
crimes.

1. Children under the age of fourteen, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness;

2. Idiots;

3. Lunatics and insane persons;

4. Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent;

5. Persons who committed the act charged without being conscious thereof;

6. Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence;

7. Married women (except for felonies) acting under the threats, command, or coercion of their husbands;

8. Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.

Same.

with death) acting under the threats, command, or coercion of their husbands;

8. Persons (unless the crime be punishable with death) who committed the act or made the omission charged, under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.

NOTE.—Stats. 1856, p. 219, Sec. 1.

Subd. 1.—The criminal liability of infants is elaborately discussed in a learned article in 5 Law Rep. (N. S.), p. 364, under the following heads:

1. Their liability below the age of seven years;
2. Their liability between the ages of seven and fourteen years;
3. Their liability above the age of fourteen years;
4. Confessions of infants.

From this article we make the following extracts:

1. *Their liability below the age of seven years.*—It is laid down by most elementary writers on criminal law that if an infant be under seven years of age he cannot be guilty of felony, whatever circumstances may appear proving his discretion; for *ex presumptione juris* he cannot have discretion, and no averment shall be received against that presumption.—1 Hale's Pleas of the Crown, p. 27; Plowden, p. 19a; Dalton's Justice, Chap. 147, p. 334; 1 Hawk. P. C., p. 2; 4 Bl. Com., pp. 22, 23. It is conceived, however, that this question is not well founded, and that if an infant under seven is proved to have sufficient discretion, and to know good from evil, he is liable to prosecution, as well as above that age. The maxim, *malitia supplet ætatem*, applies as well to one under as to one above the age of seven years. There seems to be no reason why any one like Crichton, Pascal, or White, at a very early age exhibiting evidence of unusual mental development and strong powers of mind, and capacity of knowing good from evil, should not be as responsible for his intelligent acts on the day before as well as the day after his arrival at the age of seven years. The assumption of seven years as the commencement of criminal responsibility is entirely arbitrary, and the fact that elementary writers have quite generally agreed upon such a principle of law can hardly be relied upon as a defense should a case arise where the facts clearly show that an infant under seven had, with actual malice and knowledge of his

wrongful act, committed an offense under the law. Besides, this point may be considered not entirely without direct authority, for there is a precedent in the Register, fol. 309*b*, of a pardon granted to an infant within seven years who was indicted for homicide, the jury having found that he did the act before he was seven years old.—1 Hale's Pleas of the Crown, p. 28 (N. E.)

2. *Their liability between the ages of seven and fourteen.*—But whatever may be the law relative to persons under the age of seven, all authorities agree that at that age criminal responsibility commences, and subject to the presumption in favor of infants, they are amenable for any and all crimes committed by them, whether felonies or misdemeanors. This may be considered:

a. In the instances where infants under fourteen have been indicted.

b. To convict children under fourteen, the prosecution must clearly prove that the infant, in doing the act, knew that he was doing wrong.

c. The liability of infants for the crime of rape.

d. *The fact of guilty knowledge must be distinctly made out.*

The presumption of law in favor of infants under fourteen, and the necessity of satisfying the jury that the child, when committing the act, must have known that he was doing wrong, is well illustrated by the case of *R. vs. Owen*, 4 Carrington & Payne, p. 236 (1830), where a girl ten years of age was indicted for stealing coals. It was proved that she was standing by a large heap of coals belonging to the prosecutor, and that she had a basket upon her head containing a few coals which the girl herself said she had taken from the heap. Little-dale, J., in summing up to the jury, remarked: "In this case, there are two questions: First, did the prisoner take the coals? and second, if she did, had she at the time a guilty knowledge that she was doing wrong? The prisoner is only ten years of age, and unless you are satisfied by the evidence that, in committing this offense, she knew that she was doing wrong, you ought to acquit her. Whenever a person committing a felony is under fourteen years of age, the presumption of law is that he or she has not sufficient capacity to know that it is wrong, and such person ought not to be convicted unless there be evidence to satisfy the jury that the party, at the time of the offense, had a guilty knowledge that he or she was doing wrong." The jury returned a verdict of "Not guilty,"

adding: "We do not think the prisoner had any guilty knowledge." So in *People vs. Davis*, Wheeler C. C., p. 230 (1823), in an indictment for larceny, the defendant being not yet fourteen years old by a few weeks. The taking was clearly proved, but no evidence was offered of his capacity to commit crime, and the jury was instructed that the law presumes an infant under fourteen incapable of committing crimes, "and in order to show his liability, it was necessary to prove his capacity;" and there being no evidence either way upon the point the defendant was acquitted. The same principle was adopted in *Walker's Case*.—5 City Hall Recorder, p. 137 (1820). This doctrine was again distinctly affirmed in the *Queen vs. Smith*, 1 Cox C. C., p. 260 (1845), where a boy ten years of age was indicted for maliciously setting fire to a hayrick. The act of firing was clearly proved, but there was no proof of a malicious intention. Erle, J., told the jury: "Where a child is under the age of seven years the law presumes him incapable of committing a crime; after the age of fourteen he is presumed to be responsible for his actions as entirely as if he were forty, but between the ages of seven and fourteen no presumption of law arises at all, and that which is termed a malicious intent, a guilty knowledge that he was doing a wrong, must be proved by the evidence, and cannot be presumed from the mere commission of the act." This fact of guilty knowledge may often be proved from the circumstances of the case: as, if the prisoner conceals himself, denies the act, or in any way shows a consciousness that he was doing wrong. Thus, in the case of *State vs. Doherty*, 2 Overton (Term 1806), where a girl between twelve and thirteen years of age was indicted for murder, the jury was instructed: "That if an infant is under fourteen and not less than seven, the presumption of law was that he could not discern between right and wrong. But this presumption is removed, if from the circumstances it appears the person discovered a consciousness of wrong." That this fact of guilty knowledge may appear from the circumstances of the case, see *Stage's Case*, 5 City Hall Recorder, p. 177 (1821), where a boy of the age of eight years was indicted for the larceny of a lady's dressing box and jewelry. The owner detected the boy going out of the house with the box under his arm; she seized him, and he tried to bite her and retain the box by force. He then began to cry, and said another boy told him to take away the box. No other evidence of capacity was offered. The jury were told that they

must be satisfied that he had a capacity of knowing good from evil; that this might be proved by extrinsic testimony, or it might arise from the circumstances of the case. Here a concealment and an attempt to escape appear. It was for the jury to say that the defendant knew that he was doing wrong. The defendant was convicted.

3. *The liability of infants above the age of fourteen.* Here all authorities agree that, with but a single class of exceptions, entire criminal responsibility commences, and the presumption of incompetency wholly ceases. Blackstone, on this point, says: "The law of England does in some cases privilege an infant under the age of twenty-one, as to common misdemeanor, so as to escape fine, imprisonment, and the like, and particularly in cases of omission, as not repairing a breach on highway, and other similar offenses; for, not having the command of his fortune till twenty-one, he wants the capacity to do these things which the law requires. But where there is any notorious breach of the peace, a riot, or a battery, or the like (which infants, when full grown, are at least as liable as others to commit), for these an infant above the age of fourteen is equally liable to suffer as a person of the full age of twenty-one years."—See, also, 1 Hale, P. C., pp. 20–22.

4. *Confession of an infant.* The question has been much discussed whether the confessions of an infant are admissible against him in proof of the commission of crime; and it has been sometimes thought that as in a civil case an infant is not bound by his admissions and declarations, so in a criminal case his declarations of his own guilt are not admissible; and if so, are not a sufficient proof of the commission of the crime. But this reasoning seems not to be supported, and it is well settled upon the authorities that the confessions of an infant, if otherwise competent, are admissible against him, in the same manner as confessions of adults.—Rex vs. Wild, 2 Moody, p. 452 (1835); R. vs. Upchurch, 1 ib., C. C., p. 465 (1835); Mather vs. Clark, 2 Aiken, p. 209 (Vermont, 1827); Commonwealth vs. Zard, cited, Ros. Cr. Ev., p. 31, note. This question seems to have received more consideration in this country than in England. Thus, in the State vs. Aaron, 1 Southard, p. 231 (New Jersey, 1818), a slave of the age of ten years and ten months was indicted for murder, and it was much discussed whether his confessions of the crime were admissible in evidence. It was held that they were admissible, but to furnish the grounds of a conviction they ought to be clear and pregnant

and corroborated by circumstances, and understandingly. One of the most striking criminal trials to be found on record was that of *The State vs. Guild*, 5 Halsted, p. 163 (New Jersey, 1828). There the prisoner, aged twelve years and five months, was indicted for the murder of Catharine Beakes; his own confessions were the principal evidence, the *corpus delicti* being otherwise proved. The Court held this sufficient, and the boy was convicted and executed.

Subd. 2.—1 Wharton's Am. Cr. Law, Sec. 15.

Subd. 3.—Collinson on Lunacy, p. 573; *R. vs. Oxford*, 9 C. & P., p. 533; *Burrows' Case*, 1 Lewin, p. 238; *R. vs. Goode*, 7 Ad. & El., p. 536; *Hadfield's Case*, 27 How. St. Tr., p. 1316; *R. vs. Vaughan*, 1 Cox C. C., p. 80; *R. vs. Layton*, 4 Cox C. C., p. 185; *Com. vs. Rogers*, 7 Met., p. 500; *Com. vs. Mosler*, 4 Barr., p. 267; *Freeman vs. People*, 4 Denio, p. 10; *State vs. Spencer*, 1 Zabriskie, p. 196; 1 Wharton's Am. Cr. Law, Sec. 15; *People vs. Coffman*, 24 Cal., p. 230; *People vs. March*, 6 Cal., p. 543; *People vs. Olwell*, 28 Cal., p. 456; *People vs. Smith*, 31 Cal., p. 466. A person is presumed to be sane until the contrary appears. *People vs. Myers*, 20 Cal., p. 518.

Subd. 4.—Broom's Legal Maxims, p. 190; *Myers vs. State*, 1 Com., p. 502; *Com. vs. Kirby*, 2 Cush., p. 577; *U. S. vs. Pearce*, 2 McLean, p. 14. If a man intending to kill a thief in his own house kill one of his own family, he is guilty of no offense.—4 Bl. Com., p. 27; 1 Hale P. C., p. 42; 1 Wharton's Am. Cr. Law, Sec. 83. So a taking by accident or mistake another's property for one's own is not criminal.—Id.

Subd. 7.—*Davis vs. State*, 15 Ohio, p. 72; 1 Wharton's Am. Cr. Law, Sec. 71. If the husband is present at the time the crime is committed, the presumption is that the wife acted under his coercion.—1 Russel on Crimes, p. 21; *State vs. Parkerson*, 1 Strobbart, p. 169; *Com. vs. Trimmer*, 1 Mass., p. 476; *R. vs. Stapleton*, 1 Crawf. & Dix C. C., p. 163; *R. vs. Matthew*, 1 Den. C. C., p. 596; 1 Wharton's Am. Cr. Law, Sec. 73.

Who are
liable to
punish-
ment.

27. The following persons are liable to punishment under the laws of this State:

1. All persons who commit, in whole or in part, any crime within this State;

2. All who commit larceny or robbery out of this State, and bring to, or are found with the property stolen, in this State;

3. All who, being out of this State, cause or aid, advise or encourage, another person to commit a crime within this State, and are afterwards found therein.

TITLE II.

OF PARTIES TO CRIME.

SECTION 30. Classification of parties to crime.

31. Who are principals.

32. Who are accessories.

33. Punishment of accessories.

30. The parties to crimes are classified as:

1. Principals; and,

2. Accessories.

Classifica-
tion of
parties to
crime.

NOTE.—Bl. Com., Vol. 4, p. 32. *Principals*.—At common-law principals were of the first and second degrees. A principal of the first degree was one who did the act himself, directly or by means of an innocent agent. A principal of the second degree was one who was present, lending his countenance and encouragement, or otherwise aiding while another did the act. The distinction was only formal, having no practical use or effect whatever, and in this State was abolished by Sec. 11 of the Act concerning crimes and punishments.—People vs. Bearss, 10 Cal., p. 68. For the Code definition of principals see Sec. 31. “*An accessory before the fact*,” says Mr. Bishop (1 Bishop’s Cr. Law, p. 473), “is one whose will contributes to another’s felonious act, committed while too far himself from the act to be a principal. The legal distinction between the accessory before and the principal rests solely in authority, for it is without foundation either in reason or the ordinary doctrines of the law. The general rule in our jurisprudence, civil and criminal, is that what one does through another’s agency he does in point of law himself.” The distinction between principal and accessory before the fact is not maintained by the Code.—See Sec. 31. *An accessory after the fact* is one who receives, harbors, or otherwise assists to elude justice, another whom he knows is

guilty of felony.—4 Bl. Com., p. 37; 1 Bishop's Cr. Law, Sec. 487. There are no accessories after the fact in misdemeanors.—1 Bishop on Cr. Law, Sec. 499; see Code, Sec. 32.

Who are principals.

31. (§§ 11, 12.) All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed..

NOTE.—This definition includes the principal of the first and second degree, and the accessory before the fact of the common law.—Foster's Cr. Law, p. 340; 1 East P. C., p. 118; 9 Pick., p. 496; People vs. Hodges, 27 Cal., p. 340; People vs. Davidson, 5 Cal., p. 133; People vs. Bearss, 10 Cal., p. 68; see note to Sec. 30.

Who are accessories.

32. (§ 12.) All persons who, after full knowledge that a felony has been committed, conceal it from the magistrate, or harbor and protect the person charged with or convicted thereof, are accessories.

NOTE.—The distinction between principals and accessories before the fact having been abolished (People vs. Bearss, 10 Cal., p. 68), it was not deemed advisable to retain the phrase "after the fact," in this section. The only accessory recognized by the Code being the accessory after the fact, as known to the common law.—See note to Sec. 30.

Punishment of accessories.

33. (§ 12.) Except in cases where a different punishment is prescribed, an accessory is punishable by imprisonment in the State Prison not exceeding five years, or in a County Jail not exceeding two years, or by fine not exceeding five thousand dollars.

2. ACCESSORIES.—Under an indictment which charges a defendant is principal, he cannot be found guilty if the evidence shows him to be an accessory before the fact. People v. McGungell, 41 Cal. 429.

31. If there is a conspiracy between two persons who fired to commit a felony, it is immaterial whether the defendant on trial fired the fatal shot, or the other person, as both are equally guilty. People v. Woody, 45 Cal. 289.

TITLE III.

OF OFFENSES AGAINST THE SOVEREIGNTY OF THE STATE.

SECTION 37. Treason, who only can commit.

38. Misprision of treason.

37. (§§ 16, 17.) Treason against this State consists only in levying war against it, adhering to its enemies, or giving them aid and comfort, and can be committed only by persons owing allegiance to the State. The punishment of treason shall be death.

Treason,
who only
can commit

NOTE.—Const., Art. I, Sec. 20. *Levying war.*—To constitute treason war must be actually levied against the State. However flagitious may be the crime of conspiracy to subvert by force the government of a State, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are two distinct offenses. The first must be brought into open action by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. So far has the principle been carried that it has been held that the actual enlistment of men to serve against the Government does not amount to levying war. There must be an actual assembling of men for the treasonable purpose to constitute a levying of war.—Ex Parte Bollman, 4 Cranch, p. 126; United States vs. Burr, 4 Cranch, p. 469; Serg. on Const., p. 32; People vs. Lynch, 1 Johns., p. 553. *Adhering to enemies.*—Every assistance yielded by a person owing allegiance to a State to its enemies, unless given from a well grounded apprehension of immediate death in case of a refusal, is treason within this branch of the statute.—Foster's Cr. Law, p. 216; 1 Hawkins P. C., p. 8; Rex vs. Vaughan, 2 Salk., p. 635; U. S. vs. Hodges, 2 Dallas, p. 87; 2 Wheeler's C. C., p. 477; Respublica vs. McCarty, 2 Dallas, p. 87. *Owing allegiance to the State.*—As to, see Political Code, Sec. 55. Treason against the United States is not cognizable in a State Court.—People vs. Lynch, 11 Johnson, p. 549; see U. S. Const. annotated, App. Pol. Code Cal.

38. (§ 18.) Misprision of treason is the knowledge and concealment of treason, without otherwise assenting to or participating in the crime. It is pun-

Misprision
of treason

Voting
without
being
qualified,
voting
twice, and
other elec-
tion frauds,
felonies.

45. Every person not entitled to vote, who fraudulently votes, and every person who votes more than once at any one election, or knowingly hands in two or more tickets folded together, or changes any ballot after the same has been deposited in the ballot box, or adds, or attempts to add, any ballot to those legally polled at any election, either by fraudulently introducing the same into the ballot box before or after the ballots therein have been counted; or adds to or mixes with, or attempts to add to or mix with, the ballots lawfully polled, other ballots, while the same are being counted or canvassed, or at any other time, with intent to change the result of such election; or carries away or destroys, or attempts to carry away or destroy, any poll list, or ballots, or ballot box, for the purpose of breaking up or invalidating such election, or willfully detains, mutilates, or destroys any election returns, or in any manner so interferes with the officers holding such election or conducting such canvass, or with the voters lawfully exercising their rights of voting at such election, as to prevent such election or canvass from being fairly held and lawfully conducted, is guilty of felony.

NOTE.—Stats. 1855, p. 296, Sec. 1; 1858, p. 165, Sec. 1.
Not entitled to vote. Where one takes advice from a person not a member of the bar concerning his right to vote, he cannot set up this advice in defense on a charge of illegal voting. But if he states the facts to the Judges of Election, and they decide in favor of his right to vote, their decision would rebut the presumption of guilty knowledge on his part.—*State vs. Boyet*, 10 Ired., p. 336. Ignorance of law will not excuse an act of illegal voting, but on the other hand there must be shown to have been within the knowledge of the defendant a state of facts which would legally disqualify him from voting.—*McGuire vs. State*, 7 Humph., p. 54; *Reg. vs. Price*, 3 Per. & D., p. 421; 11 A. & E., p. 727; *Commonwealth vs. Bradford*, 9 Met., p. 268.
Voting twice. *Commonwealth vs. Silsbee*, 9 Mass., p. 417; *State vs. Bailey*, 21 Maine, p. 62; *State vs. Williams*, 25 Maine, p. 561; *Walker vs. Winn*, 8 Mass., p.

248; Clark vs. Binney, 2 Pick., p. 113. The act of voting twice must be done knowingly.—People vs. Harris, 29 Cal., p. 679.

46. Every person not entitled to vote, who fraudulently attempts to vote, or who, being entitled to vote, attempts to vote more than once at any election, is guilty of a misdemeanor. Attempting to vote without being qualified.

• NOTE.—Stats. 1850, p. 111, Sec. 101.

47. Every person who procures, aids, assists, counsels, or advises another to give or offer his vote at any election, knowing that the person is not qualified to vote, is guilty of a misdemeanor. Procuring illegal voting a misdemeanor.

NOTE.—Stats. 1866, p. 511, Sec. 8.

48. Every officer or clerk of election who aids in changing or destroying any poll list, or in placing any ballots in the ballot box, or taking any therefrom, or adds, or attempts to add, any ballots to those legally polled at such election, either by fraudulently introducing the same into the ballot box before or after the ballots therein have been counted, or adds to or mixes with, or attempts to add to or mix with the ballots polled any other ballots, while the same are being counted or canvassed, or at any other time, with intent to change the result of such election, or allows another to do so, when in his power to prevent it, or carries away or destroys, or knowingly allows another to carry away or destroy any poll list, ballot box, or ballots lawfully polled, is punishable by imprisonment in the State Prison for not less than two nor more than seven years. Changing ballots or altering returns by election officers, felonies.

NOTE.—Stats. 1858, p. 165, Sec. 2.

49. Every Inspector, Judge, or Clerk of an election, who, previous to putting the ballot of an elector in the ballot box, attempts to find out any name on such ballot, or who opens or suffers the folded ballot of any elector which has been handed in to be opened or Inspectors unfolding or marking tickets guilty of a misdemeanor.

examined previous to putting the same into the ballot box, or who makes or places any mark or device on any folded ballot with the view to ascertain the name of any person for whom the elector has voted, or who, without the consent of the elector, discloses the name of any person which such Inspector, Judge, or Clerk has fraudulently or illegally discovered to have been voted for by such elector, is punishable by fine, not less than fifty nor more than five hundred dollars.

NOTE.—Stats. 1863, p. 398, Sec. 1.

Forging or
altering
returns a
felony.

50. Every person who forges or counterfeits returns of an election purporting to have been held at a precinct, town, or ward where no election was in fact held, or willfully substitutes forged or counterfeit returns of election in the place of the true returns, for a precinct, town, or ward where an election was actually held, is punishable by imprisonment in the State Prison for a term not less than two nor more than ten years.

NOTE.—Stats. 1863, p. 399, Sec. 1.

Adding to
or subtract-
ing from
votes given
a felony.

51. Every person who willfully adds to or subtracts from the votes actually cast at an election, in any returns, or who alters such returns, is punishable by imprisonment in the State Prison for not less than one nor more than five years.

NOTE.—Stats. 1863, p. 399, Sec. 1.

Persons
aiding and
abetting or
concealing
guilty of
felony.

52. Every person who aids or abets in the commission of any of the offenses mentioned in the four preceding sections, is punishable by imprisonment in the County Jail for the period of six months, or in the State Prison not exceeding two years.

able to the District Attorney or Grand Jury of proper county, or to some Justice of the Peace of such county, is punishable by imprisonment in the County Jail for the period of six months, or in the State Prison not exceeding two years.

NOTE.—Stats. 1863, p. 399, Sec. 1.

53. Every person who, by force, threats, menaces, bribery, or any corrupt means, either directly or indirectly, attempts to influence any elector in giving his vote, or to deter him from giving the same, or attempts by any means whatever to awe, restrain, hinder, or disturb any elector in the free exercise of the right of suffrage, or furnishes any elector wishing to vote, who cannot read, with a ticket, informing or giving such elector to understand that it contains a name written or printed thereon different from the name which is written or printed thereon, or defrauds any elector at any such election, by deceiving and causing such elector to vote for a different person for any office than he intended or desired to vote for; or who, being Inspector, Judge, or Clerk of any election, while acting as such, induces, or attempts to induce, any elector, either by menace or reward, or promise thereof, to vote differently from what such elector intended or desired to vote, is guilty of a misdemeanor.

Intimidating, corrupting, deceiving, or defrauding electors, a misdemeanor.

NOTE.—Stats. 1850, p. 110, Sec. 98; Reg. vs. Soley, 11 Mod., p. 115; Rex vs. Cripland, 11 Mod., p. 387; Rex vs. Plympton, 2 Ld. Raym, p. 1377; Rex vs. Pitt, 3 Burr., p. 1335; Rex vs. Jolliffe, 1 East, p. 154; Com. vs. Callaghan, 2 Va. Cas., p. 460; 1 Russ. Crimes, p. 154; 1 Bishop Cr. Law, Sec. 368.

54. Every person who, with intent to promote the election of himself or any other person, either—

Furnishing money for elections except for specific purposes.

1. Furnishes entertainment at his expense to any meeting of electors previous to or during an election;

2. Pays for, procures, or engages to pay for any such entertainment;

3. Furnishes or engages to pay or deliver any money or property for the purpose of procuring the attendance of voters at the polls, or for the purpose of compensating any person for procuring attendance of voters at the polls, except for the conveyance of voters who are sick or infirm;

4. Furnishes or engages to pay or deliver any money or property for any purpose intended to promote the election of any candidate, except for the expenses of holding and conducting public meetings for the discussion of public questions and of printing and circulating ballots, handbills, and other papers previous to such election;

—Is guilty of a misdemeanor.

Unlawful
offers to
procure
office for
electors.

55. Every person who, being a candidate at any election, offers or agrees to appoint or procure the appointment of any particular person to office, as an inducement or consideration to any person to vote for, or procure or aid in procuring the election of such candidate, is guilty of a misdemeanor.

Communi-
cating
such offer.

56. Every person, not being a candidate, who communicates any offer, made in violation of the last section, to any person, with intent to induce him to vote for or to procure or aid in procuring the election of the candidate making the offer, is guilty of a misdemeanor.

Bribing or
offering to
bribe
members of
legislative
caucuses,
etc.

57. (§§ 84, 85, 86.) Every person who gives or offers a bribe to any officer or member of any legislative caucus, political convention, committee, primary election, or political gathering of any kind, held for the purpose of nominating candidates for offices of honor, trust, or profit, in this State, with intent to influence the person to whom such bribe is given or offered to be more favorable to one candidate than another, and every person, member of either of the bodies in this section mentioned, who receives or offers to receive any such bribe, is punishable by imprisonment in the State Prison not less than one nor more than fourteen years.

NOTE.—Stats. 1850, p. 249, Secs. 84, 85, 86; 1863, p. 645, Secs. 1, 2, 3.

58. Every person who, by threats, intimidations, or unlawful violence, willfully hinders or prevents electors from assembling in public meeting for the consideration of public questions, is guilty of a misdemeanor.

Preventing
public
meetings.

59. Every person who willfully disturbs or breaks up any public meeting of electors or others, lawfully being held for the purpose of considering public questions, is guilty of a misdemeanor.

Disturb-
ance of
public
meetings.
misde-
meanor.

60. Every person who makes, offers, or accepts any bet or wager upon the result of any election, or upon the success or failure of any person or candidate, or upon the number of votes to be cast, either in the aggregate or for any particular candidate, or upon the vote to be cast by any person, is guilty of a misdemeanor.

Betting on
elections.

NOTE.—The statutes of Kentucky provide for the punishment of any person who “shall wager or bet any sum of money or other thing upon the election of any of the officers” mentioned in a previous section “within six months next before the election.”—*Commonwealth vs. Kirk*, 4 B. Mon., p. 1. The language of the Alabama Act is: “Every person who shall hereafter make any bet or wager of money or other thing of value upon any election in this State,” etc.—*Givens vs. Rogers*, 11 Ala., p. 543. This provision has been held not applicable to a case of betting after the result is over.—*State vs. Mahan*, 2 Ala., p. 340. These statutes are not construed to interfere with betting on elections out of the State, or to extend to unauthorized elections within the State.—*Huckerson vs. Benson*, 8 Mo., p. 8. The Illinois Act was held not to apply to a wager on the vote of Kentucky for President.—*Morgan vs. Petit*, 3 Scam., p. 529. But where the wager was upon the entire result of the Presidential ticket, it was held to be within an enactment which had the words, “any election or elections in this State.”—*Quarles vs. State*, 5 Humph., p. 561. It will be observed, however, that the words, “in this State,” do not appear in Section 60. A bet that a particular candidate will receive a given number of votes (*Commonwealth vs. Kirk*, 4 B. Mon., p. 1), or will beat another candidate (*Commonwealth vs. Pash*, 9 Dana, p. 31), and a bet upon the

general result of the election (State vs. Cross, 2 Humph., p. 301), are equally within the statute. So, if the parties agree that the one who fails in his estimate shall make the other a present of a coat, etc., the case is a bet within the statute.—Cain vs. State, 13 Sm. & M., p. 456.

Violation
of election
laws by
persons not
officers.

61. Every person who willfully violates any of the provisions of the laws of this State relating to elections is, unless a different punishment for such viola-

62. Every person who prints any ticket not in conformity with section one thousand one hundred and ninety-one of the Political Code, or who circulates or gives to another any ticket, knowing at the time that such ticket does not conform to the provisions of section one thousand one hundred and ninety-one of the Political Code, is guilty of a misdemeanor. [Approved March 25, 1874.]

OF CRIMES BY AND AGAINST THE EXECUTIVE POWER OF THE STATE.

SECTION 65. Acting in a public capacity without having qualified.

66. Acts of officers de facto not affected.

67. Giving or offering bribes to executive officers.

● 68. Asking or receiving bribes.

69. Resisting officers.

70. Extortion.

71. Violation of laws prohibiting certain officers from dealing in scrip, etc., and from being interested in contracts.

72. Fraudulently presenting bills or claims to public officers for allowance or payment.

73. Buying appointments to office.

74. Taking rewards for deputation.

75. Exercising functions of office wrongfully.

76. Refusal to surrender books, etc., to successor.

77. Preceding sections to apply to administrative and ministerial officers.

Acting in a
public
capacity
without
having
qualified.

65. Every person who exercises any function of a public office without taking the oath of office, or without giving the required bond, is guilty of a misdemeanor. the required bond, is guilty of a misdemeanor, and forfeits his right to the office.

66. The last section shall not be construed to affect the validity of acts done by a person exercising the functions of a public office in fact, where other persons than himself are interested in maintaining the validity of such acts.

Acts of
Officers de
facto not
affected.

67. Every person who gives or offers any bribe to any executive officer of this State, with intent to influence him in respect to any act, decision, vote, opinion, or other proceeding as such officer, is punishable by imprisonment in the State Prison not less than one nor more than fourteen years, and is disqualified from holding any office in this State.

Giving or
offering
bribes to
executive
officers.

NOTE.—Stats. 1863, Secs. 1, 2, 3. It has been held indictable at common law to be concerned in the bribery, or attempt to bribe, a Cabinet Minister.—Vaughan's Case, 4 Burr., p. 2494. Member of the Legislature.—Whart. Prec., p. 1012, note. Commissioner of the revenue.—U. S. vs. Norvell; Wharton's St. Trials, p. 189. Sheriff.—Barefield vs. State, 14 Ala., p. 603.

68. Every executive officer, or person elected or appointed to an executive office, who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his vote, opinion, or action upon any matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby, is punishable by imprisonment in the State Prison not less than one nor more than fourteen years; and, in addition thereto, forfeits his office, and is forever disqualified from holding any office in this State.

Asking or
receiving
bribes.

NOTE.—Stats. 1863, p. 645, Secs. 1, 2, 3.

69. Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by fine not exceeding five

Resisting
officers.

thousand dollars, and imprisonment in the County Jail not exceeding five years.

NOTE.—Stats. 1860, p. 125, Sec. 1; State vs. Lovett, 3 Vt., p. 110; State vs. Haley, 2 Strob., p. 73; State vs. Henderson, 15 Mo., p. 486; State vs. Noyes, 25 Vt., p. 415; Crumpton vs. Newman, 12 Ala., p. 199.

70. Every executive or ministerial officer who knowingly asks or receives any emolument, gratuity, or reward, or any promise thereof, excepting such as may be authorized by law, for doing any official act, is guilty of a misdemeanor.

NOTE.—Stats. 1850, p. 242, Sec. 107; 4 Bl. Com., p. 1 Russ. Crimes, p. 142; 1 Hawk. P. C., Sec. 1; Reg. vs. Tracy, 6 Mod., p. 30; Runnels vs. Fletcher, 15 Mass., p. 525; Respublica vs. Hannum, 1 Yeates, p. 71; State vs. Stotts, 5 Blackf., p. 460; People vs. Whaley, 6 Cow., p. 661; Reg. vs. Best, 2 Moody, p. 124; Com. vs. Bagley, 7 Pick., p. 279; Shattuck vs. Woods, 1 Pick., p. 171; see, also, 2 Bishop's Cr. Law, Secs. 328, 329, 330, 331. The offense implies the existence of a corrupt mind, and it is not committed when the fee come voluntarily in return for real benefits conferred by extra exertions put forth.—2 Bishop's Cr. Law, Secs. 326, 332, 333, 334, 335, 336, and 337.

Violation
of laws
prohibiting
certain
officers
from deal-
ing in scrip,
etc., and
from being
interested
in contracts

71. Every officer or person prohibited by the laws of this State from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip, or other evidences of indebtedness, who violates any of the provisions of such laws, is punishable by a fine of not more than one thousand dollars, or by imprisonment in the State Prison not more than five years, and is forever disqualified from holding any office in this State.

Fraudu-
lently
presenting
bills or
claims to
public
officers for
allowance
or payment

72. Every person who, with intent to defraud, presents for allowance or for payment to any State Board or officer, or to any county, town, city, ward, or village Board or officer, authorized to allow or pay the same if genuine, any false or fraudulent claim, bill, account, voucher, or writing, is guilty of felony.

73. Every person who gives or offers any gratuity or reward, in consideration that he or any other person shall be appointed to any public office, or shall be permitted to exercise or discharge the duties thereof, is guilty of a misdemeanor.

Buying appointments to office.

NOTE.—Stats. 1850, p. 239, Sec. 85; 2 Bishop's Cr. Law, Secs. 190, 191; Rex vs. Vaughan, 4 Bur., p. 2494; Rex vs. Pollman, 2 Camp, p. 229; 1 Russ. on Crimes, p. 147; Commonwealth vs. Callaghan, 2 Va. Cases, p. 460.

74. Every public officer who, for any gratuity or reward, appoints another person to a public office, or permits another person to exercise or discharge any of the duties of his office, is punishable by a fine not exceeding five thousand dollars, and, in addition thereto, forfeits his office and is forever disqualified from holding any office in this State.

Taking rewards for deputation.

NOTE.—Stats. 1850, p. 239, Sec. 85; see note to Sec. 73.

75. Every person who willfully and knowingly intrudes himself into any public office to which he has not been elected or appointed, and every person who, having been an executive officer, willfully exercises any of the functions of his office after his term has expired, and a successor has been elected or appointed and has qualified, is guilty of a misdemeanor.

Exercising functions of office wrongfully.

NOTE.—Stats. 1850, p. 242, Sec. 105,

76. Every officer whose office is abolished by law, or who, after the expiration of the time for which he may be appointed or elected, or after he has resigned or been legally removed from office, willfully and unlawfully withholds or detains from his successor, or other person entitled thereto, the records, papers, documents, or other writing appertaining or belonging to his office, or mutilates, destroys, or takes away the

Refusal to surrender books, etc., to successor.

same, is punishable by imprisonment in the State Prison not less than one nor more than ten years.

NOTE.—Stats. 1850, p. 240, Sec. 89.

Preceding sections to apply to administrative and ministerial officers.

77. The various provisions of this Chapter apply to administrative and ministerial officers, in the same manner as if they were mentioned therein.

TITLE VI.

OF CRIMES AGAINST THE LEGISLATIVE POWER.

SECTION 81. Preventing the meeting or organization of either branch of the Legislature.

82. Disturbing the Legislature while in session.

83. Altering draft of bill or resolution.

84. Altering enrolled copy of bill or resolution.

85. Giving or offering bribes to members of the Legislature.

86. Receiving bribes by members of the Legislature.

87. Witnesses refusing to attend, testify, or produce papers before the Legislature or committees thereof.

88. Members of the Legislature, in addition to other penalties, to forfeit office and be disqualified, etc.

Preventing the meeting or organization of either branch of the Legislature

81. Every person who willfully, and by force or fraud, prevents the Legislature of this State, or either of the Houses composing it, or any of the members thereof, from meeting or organizing, is guilty of felony.

Disturbing the Legislature while in session.

82. Every person who willfully disturbs the Legislature of this State, or either of the Houses composing it, while in session, or who commits any disorderly conduct in the immediate view and presence of either House, tending to interrupt its proceedings or impair the respect due to its authority, is guilty of a misdemeanor.

Altering draft of bill or resolution.

83. Every person who fraudulently alters the draft of any bill or resolution which has been presented to either of the Houses composing the Legislature, to be

passed or adopted, with intent to procure it to be passed or adopted by either House, or certified by the presiding officer of either House, in language different from that intended by such House, is guilty of felony.

84. Every person who fraudulently alters the enrolled copy of any bill or resolution which has been passed or adopted by the Legislature of this State, with intent to procure it to be approved by the Governor, or certified by the Secretary of State, or printed or published by the printer of the statutes, in language different from that in which it was passed or adopted by the Legislature; is guilty of felony.

Altering
enrolled
copy of bill
or
resolution.

85. (§§ 84, 85, 86.) Every person who gives or offers to give a bribe to any member of the Legislature, or to another person for him, or attempts by menace, deceit, suppression of truth, or any corrupt means, to influence a member in giving or withholding his vote, or in not attending the House or any committee of which he is a member, is punishable by imprisonment in the State Prison not less than one nor more than ten years.

Giving or
offering
bribes to
members of
the Legis-
lature.

NOTE.—Stats. 1863, p. 645, Secs. 1, 2; Wharton's Am. Cr. Law, Sec. 2815; Wharton's Prec., p. 1012, note; 2 Bishop's Cr. Law, Secs. 76, 77, 78, 79; 3 Greenleaf on Evidence, Secs. 71-73.

86. (§§ 84, 85, 86.) Every member of either of the Houses composing the Legislature of this State who asks, receives, or agrees to receive any bribe, upon any understanding that his official vote, opinion, judgment, or action shall be influenced thereby, or shall be given, in any particular manner, or upon any particular side of any question or matter upon which he may be required to act in his official capacity, or gives, or offers, or promises to give, any official vote in consideration that another member of the Legislature

Receiving
bribes by
members
of the
Legislature

shall give any such vote either upon the same or another question, is punishable by imprisonment in the State Prison not less than one nor more than fourteen years.

NOTE.—Stats. 1863, p. 645, Secs. 1, 2. Extended, however, to embrace what is known as “log rolling,” or agreements to exchange votes for or against measures pending before the Legislature; and, also, so as to embrace deceits and concealments practiced upon members of the Legislature to obtain their votes. In *Marshall vs. Baltimore & Ohio R. R. Co.*, 16 How. (U. S.) R., p. 314, the Court (commenting upon the cases of *Fuller vs. Dame*, 18 Pick., p. 470; *Hatzfield vs. Gulden*, 7 Watts, p. 152; *Clippinger vs. Hepbaugh*, 5 Watts & S., p. 315; *Wood vs. McCan*, 6 Dana, p. 366; *Hunt vs. Test*, 8 Ala., p. 719; *The Commonwealth vs. Callaghan*, 2 Va. Cas., p. 460), say: “The sum of these cases is: 1. All contracts for a contingent compensation for obtaining legislation, or to use personal or any secret or sinister influence on legislators, are void by the policy of the law. 2. Secrecy as to the character under which the agent or solicitor acts tends to deception, and is immoral and fraudulent; and where the agent contracts to use secret influences, or voluntarily, without contract with his principal, uses such means, he cannot have the assistance of a Court to recover compensation. 3. That what, in the technical vocabulary of politicians, is termed “log rolling” is a misdemeanor at common law, punishable by indictment.

Witnesses
refusing to
attend,
testify, or
produce
papers
before the
Legislature
or
committees
thereof.

87. Every person who, being summoned to attend as witness before either House of the Legislature or any committee thereof, refuses or neglects, without lawful excuse, to attend pursuant to such summons; and every person who, being present before either House of the Legislature or any committee thereof, willfully refuses to be sworn or to answer any material and proper question, or to produce, upon reasonable notice, any material and proper books, papers, or documents in his possession or under his control, is guilty of a misdemeanor.

NOTE.—Stats. 1857, p. 97, Sec. 1.

88. Every member of the Legislature convicted of any crime defined in this Chapter, in addition to the punishment prescribed, forfeits his office and is forever disqualified from holding any office in this State.

Members of the Legislature, in addition to other penalties, to forfeit office and be disqualified, etc.

89. Every person who obtains or seeks to obtain money, or other thing of value, from another person upon a pretense, claim, or representation that he can or will improperly influence in any manner the action of any member of a legislative body in regard to any vote or legislative matter, is guilty of a felony. If, upon the trial of an indictment found under the provisions of this section, the accused is examined as a witness in his own behalf, evidence may then be given that he has committed acts in violation of the provisions of this section other than the act charged in the indictment. Upon the trial, no person, otherwise competent as a witness, shall be disqualified from testifying as such concerning the offense charged on the ground that such testimony may criminate himself; but no prosecution can afterward be had against him for any offense concerning which he testified. [Approved March 30, 1890.]

TIT.

OF CRIMES AGAINST THE STATE.

- CHAPTER I. *Bribery*
- II. *Rescues.*
- III. *Escapes*
- IV. *Forging, falsifying and destroying Documents*
- V. *Perjury*
- VI. *Falsifying*
- VII. *Other Offenses*
- VIII. *Conspiracies*

CHAPT.

BRIBERY AND CORRUPTION.

- SECTION 92. Giving bribes to Judges, jurors, referees, etc.
- 93. Receiving bribes by judicial officers, jurors, etc.
- 94. Extortion.
- 95. Improper attempts to influence jurors, referees, etc.
- 96. Misconduct of jurors, referees, etc.
- 97. Justice or Constable purchasing judgment.
- 98. Officers to forfeit and be disqualified from holding office.

92. (§§ 84, 85, 86, 106.) Every person who gives or offers to give a bribe to any judicial officer, juror, referee, arbitrator, or umpire, or to any person who may be authorized by law to hear or determine any question or controversy, with intent to influence his

Giving bribes to Judges, jurors, referees, etc.

vote, opinion, or decision upon any matter or question which is or may be brought before him for decision, is punishable by imprisonment in the State Prison not less than one nor more than ten years.

NOTE.—Stats. 1856, p. 220, Sec. 10; 1863, p. 645, Secs. 1, 2; People ex rel. Purley, 2 Cal., p. 564; 1 Russ. on Crimes, p. 154; 4 Bl. Com., p. 139; 3 Greenleaf on Evidence, Sec. 71; 2 Bishop Cr. Law, Secs. 76–79; R. vs. Gibbons, p. 183; 3 Wharton's Cr. Law, Sec. 2814. The offense is complete by the offer of the bribe.—3 Greenleaf on Evidence, Sec. 72; 3 Wharton's Cr. Law, Sec. 2814.

Receiving
bribes by
judicial
officers,
jurors, etc.

93. (§§ 84, 85, 86, 106.) Every judicial officer, juror, referee, arbitrator, or umpire, and every person authorized by law to hear or determine any question or controversy, who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his vote, opinion, or decision upon any matters or question which is or may be brought before him for decision, shall be influenced thereby, is punishable by imprisonment in the State Prison not less than one nor more than ten years.

NOTE.—Stats. 1856, p. 220, Sec. 10; 1863, p. 645, Secs. 84, 85, 86; see note to Sec. 92.

Extortion.

94. (§§ 84, 85.) Every judicial officer who asks or receives any emolument, gratuity, or reward, or any promise thereof, except such as may be authorized by law, for doing any official act, is guilty of a misdemeanor.

NOTE.—Stats. 1850, p. 229; see note to Sec. 70.

Improper
attempts
influence
jurors,
referees,
etc.

95. Every person who corruptly attempts to influence a juror, or any person summoned or drawn as a juror, or chosen as an arbitrator or umpire, or appointed a referee, in respect to his verdict in, or decision of, any cause pending or about to be brought before him, either:

1. By means of any communication, oral or written,

85. Every person who corruptly attempts to influence a juror, or any person summoned or drawn as a juror or chosen as an arbitrator, or umpire, or appointed referee, in respect to his verdict in, or decision of any cause, or proceeding, pending, or about to be brought before him, either:

53

1. By means of any communication, oral or written had with him except in the regular course of proceedings;

- Same.

2. By means of any book, paper, or instrument exhibited, otherwise than in the regular course of proceedings;

3. By means of any threat, intimidation, persuasion or entreaty; or,

4. By means of any promise, or assurance of any pecuniary or other advantage;

—Is punishable by fine not exceeding five thousand dollars, or by imprisonment in the State Prison not exceeding five years.

NOTE.—Stats. 1856, p. 220, Sec. 10.

86. Every juror, or person drawn or summoned as a juror, or chosen arbitrator or umpire, or appointed referee, who either:

Misconduct
of jurors,
referees,
etc.

1. Makes any promise or agreement to give a verdict or decision for or against any party; or,

2. Willfully and corruptly permits any communication to be made to him, or receives any book, paper, instrument, or information relating to any cause or matter pending before him, except according to the regular course of proceedings;

—Is punishable by fine not exceeding five thousand dollars, or by imprisonment in the State Prison not exceeding five years.
exceeding five years.

NOTE.—Stats. 1856, p. 220, Sec. 10.

97. Every Justice of the Peace or Constable of the same township who purchases or is interested in the purchase of any judgment or part thereof on the docket of, or on any docket in possession of such Justice, is guilty of a misdemeanor.

Justice or
Constable
purchasing
judgment.

98. Every officer convicted of any crime defined in this Chapter, in addition to the punishment prescribed, forfeits his office and is forever disqualified from holding any office in this State.

Officers to
forfeit and
be disquali-
fied from
holding
office.

CHAPTER II.

RESCUES.

SECTION 101. Rescuing prisoners.

102. Retaking goods from custody of officer.

Rescuing
prisoners.

101. (§§ 93, 94.) Every person who rescues or attempts to rescue, or aids another person in rescuing or attempting to rescue, any prisoner from any prison, or from any officer or person having him in lawful custody, is punishable as follows:

1. If such prisoner was in custody upon a conviction of felony punishable with death: by imprisonment in the State Prison not less than one nor more than fourteen years;

2. If such prisoner was in custody upon a conviction of any other felony: by imprisonment in the State Prison not less than six months nor more than five years;

3. If such prisoner was in custody upon a charge of felony: by a fine not exceeding one thousand dollars and imprisonment in the County Jail not exceeding two years;

4. If such prisoner was in custody otherwise than upon a charge or conviction of felony: by fine not exceeding five hundred dollars and imprisonment in the County Jail not exceeding six months.

NOTE.—Blackstone defines “rescue” to be “the forcibly and knowingly freeing another from arrest or imprisonment.”—4 Bl. Com., p. 131. “Rescue is a deliverance of a prisoner from lawful custody by any third person.”—2 Bishop Cr. Law, Sec. 893. At common law a rescue, where the restraint is for a felony, is a felony; and where the restraint is for a misdemeanor, it is a misdemeanor.—4 Bl. Com., p. 131; 2 Hawk. P. C., Sec. 6; Rex vs. Stoakes, 5 Car. & P., p. 148; Rex vs. Haswell, Russ. & Ry., p. 458.

102. Every person who wilfully injures or destroys, or takes or attempts to take, or assists any per-

son in taking or attempting to take, from the custody of any officer or person, any personal property which such officer or person has in charge under any process of law, is guilty of a misdemeanor.

Retaking
goods from
custody of
officer.

CHAPTER III.

ESCAPES AND AIDING THEREIN.

SECTION 105. Escapes from State Prison.

106. Attempt to escape from State Prison.

107. Escapes from other than State Prison.

108. Officers suffering convicts to escape.

109. Assisting prisoner to escape.

110. Carrying into prison things useful to aid in an escape.

105. Every prisoner confined in the State Prison for a term less than for life, who escapes therefrom, is punishable by imprisonment in the State Prison for a term equal in length to the term he was serving at the time of such escape.

Escapes
from State
Prison.

NOTE.—Stats. 1855, p. 203, Sec. 1. An escape is the deliverance of a person who is lawfully imprisoned, out of a prison, before he is entitled to be discharged.—5 Mass., p. 310; see, also, 2 Bishop Cr. Law, Sec. 893, et seq.

106. Every prisoner confined in the State Prison for a term less than for life, who attempts to escape from such prison, is guilty of felony.

Attempt to
escape
from State
Prison.

107. Every prisoner confined in any other prison than the State Prison, who escapes or attempts to escape therefrom, is guilty of a misdemeanor.

Escapes
from other
than State
Prison.

108. (§ 99.) Every keeper of a prison, Sheriff, Deputy Sheriff, Constable, or Jailer, or person employed as a guard, who fraudulently contrives, procures, aids, connives at, or voluntarily permits the escape of any prisoner in custody, is punishable by imprisonment in

Officers
suffering
convicts to
escape.

the State Prison not exceeding ten years, and fine not exceeding ten thousand dollars.

Assisting
prisoners
to escape.

109. (§ 98.) Every person who willfully assists any prisoner confined in any prison or in the lawful custody of any officer or person to escape, or in an attempt to escape from such prison or custody, is punishable as provided in Section 108 of this Code.

Carrying
into prison
things use-
ful to aid in
an escape.

110. (§ 96.) Every person who carries or sends into a prison anything useful to aid a prisoner in making his escape, with intent thereby to facilitate the escape of any prisoner confined therein, is punishable as provided in Section 108 of this Code.

new Section 1880
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CHAPTER IV.

FORGING, STEALING, MUTILATING, AND FALSIFYING JUDICIAL AND PUBLIC RECORDS AND DOCUMENTS.

SECTION 113. Larceny, destruction, etc., of records by officers having them in custody.

114. Larceny, destruction, etc., of records by other persons.

115. Offering false or forged instruments to be filed of record.

116. Adding names, etc., to jury lists.

117. Falsifying jury lists, etc.

Larceny,
destruction,
etc., of records
by officers
having
them in
custody.

113. (§ 87.) Every officer having the custody of any record, map, or book, or of any paper or proceeding of any Court, filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of stealing, willfully destroying, mutilating, defacing, altering or falsifying, removing or secreting the whole or any part of such record, map, book, paper, or proceeding, or who permits any other person so to do, is punishable by imprisonment in the State Prison not less than one nor more than fourteen years.

114. (§ 87.) Every person not an officer such as is referred to in the preceding section, who is guilty of

any of the acts specified in that section, is punishable by imprisonment in the State Prison not exceeding five years, or in a County Jail not exceeding one year, or by a fine not exceeding one hundred dollars, or by both.

Larceny,
destruction, etc.
of records
by other
persons.

115. Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this State, which instrument, if genuine, might be filed, or registered, or recorded under any law of this State or of the United States, is guilty of felony.

Offering
false or
forged
instru-
ments to
be filed of
record.

116. Every person who adds any names to the list of persons selected to serve as jurors for the county, either by placing the same in the jury box, or otherwise, or extracts any name therefrom, or destroys the jury box or any of the pieces of paper containing the names of jurors, or mutilates or defaces such names so that the same cannot be read, or changes such names on the pieces of paper, except in cases allowed by law, is guilty of a felony.

Adding
names,
etc., to
jury lists.

117. Every officer or person required by law to certify to the list of persons selected as jurors who maliciously, corruptly, or willfully certifies to a false or incorrect list, or a list containing other names than those selected, or who, being required by law to write down the names placed on the certified lists on separate pieces of paper, does not write down and place in the jury box the same names that are on the certified list, and no more and no less than are on such list, is guilty of a felony.

Falsifying
jury lists,
etc.

CHAPTER V.

PERJURY AND SUBORNATION OF PERJURY:

SECTION 118. Perjury defined.

119. Oath defined.

SECTION 120. Oath of office.

- 121. Irregularity in administering.
- 122. Incompetency of witness no defense.
- 123. Witness' knowledge of materiality of his testimony not necessary.
- 124. Making depositions, etc., when deemed complete.
- 125. Statement of that which one does not know to be true.
- 126. Punishment of perjury.
- 127. Subornation of perjury.
- 128. Procuring the execution of innocent person.

Perjury
defined.

118. (§ 82.) Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury.

NOTE.—At common law, perjury was the taking of a willful false oath by one who, being lawfully sworn by a competent Court to depose the truth in any judicial proceeding, swears absolutely and falsely in a matter material to the point in question, whether he be believed or not.—1 Hawk. P. C., Chap. 69, Sec. 1; 2 Russ. on Crimes, p. 596; State vs. Dodd, 3 Murph., p. 226; State vs. Simmons, 3 Murph., p. 123; Martin vs. Miller, 4 Miss., p. 47; Pankey vs. People, 1 Scam., p. 80; Hopkins vs. Smith, 3 Barb., p. 599; Jackson vs. State, 1 Carter, p. 184; De Bernie vs. State, 19 Ala., p. 23; State vs. Tappan, 1 Foster, N. H., p. 56; Pickering's Case, 8 Grat., p. 628; 3 Wharton Cr. Law, Sec. 2198. Swearing rashly or inconsiderately, but according to the belief of the witness, is not perjury.—U. S. vs. Passmore, 4 Dallas, p. 378; Griffin's Case, Recorder's Decisions, p. 43. Nor from inadvertence or mistake.—2 Russ. on Crimes, p. 597; Steinman vs. McWilliams, 6 Barr., p. 178. If a witness state his evidence truly to the writer of an affidavit, and the statements are written out erroneously, the witness is not guilty of perjury in swearing to such affidavit, provided he did not know that it was so written.—Jesse vs. State, 20 Geo., p. 156. The definition of perjury given in the statute of 1859 is as follows: "Every person having taken a lawful oath, or made affirmation in any judicial proceeding, or in any other matter where by law an oath or affirmation is required, who shall swear or affirm willfully, corruptly, and falsely in any

matter material to the issue or point in question * * * shall be deemed guilty of perjury."—Crimes and Punishment Act of 1850, Sec. 82. This enlarged definition, however, seems to have been disregarded by subsequent Legislatures; for a practice has grown up of making express provision in statutes authorizing any new mode of investigation, that false testimony given under the statute shall be perjury—thus incumbering the statutes with masses of useless and irrelevant matter. The following are some few of the leading instances of such provisions: Statutes of 1868, p. 647, Sec. 2 of the Registry Act, as amended, authorizes the County Clerks and Assessors to examine witnesses, and declares false swearing on such examination to be perjury. Secs. 3, 22, and 28 of the same Act contain similar provisions. Statutes of 1857, p. 58, authority is conferred upon committees of the Legislature to administer oaths and examine witnesses, and false swearing upon such examination is declared to be perjury. Statutes of 1853, p. 22, contain similar provisions. Statutes of 1857, p. 97, contain similar provisions. Statutes of 1861, p. 419, Sec. 17, provide that whoever, under oath, gives to Assessor false lists of property, is guilty of perjury. Statutes of 1859, p. 235 (since repealed), provide that the trustees and architect shall subscribe an oath that they will not be interested in certain contracts, and makes a violation of this oath perjury. Hundreds of such statutes might be cited, but these are sufficient for illustration. It is plain that by force of the definition of perjury contained in the Act of 1850, and above quoted, that false swearing in any instances mentioned in the statutes cited could have been punished as perjury without an express provision to that effect. Yet either from want of clearness in the general definition, or from the fact that there still remained cases in which false swearing was not perjury, i. e., the case of mere voluntary oaths (see *People vs. Travis*, 1 Park. Cr., p. 213, where, under a similar definition, it was held that perjury could not be assigned of a false oath taken before a Notary Public as part of the preliminary proofs of loss under a policy of marine insurance), the penalty of perjury has been declared again and again; of course giving rise to a question in respect to similar statutes, in which the express declaration has been omitted, whether perjury can be alleged of a violation of the statute oath. To simplify the existing law and expunge from the statutes these multiplied provisions, covering nearly the same ground, a subsequent section (Secs. 151,

152, post) declares it to be a misdemeanor to administer or take any oath except in cases there specified. The sections in this subdivision extend the penalties of perjury to violation of all oaths *authorized* by law, as well as to violations of oaths *required*. "*Testify, declare, depose, or certify.*" It is not intended to confine the definition of perjury to testimony and depositions, strictly so called. On the contrary, the section defining perjury is broad enough to embrace every class of statement which by law may be attested by an oath applying to the particular statement, in distinction from the general oath taken by public officers. Nearly every mode of oral statement under oath is embraced by the term "testify," and nearly every written one in the term "depose." But as doubts may arise as to the full extension of these terms, in peculiar cases, the Commissioners have added "declare" and "certify," in order that all modes of statement may be clearly included. *Material matter.* In *People vs. McDermott*, 8 Cal., p. 288, it was held that the false oath must be as to some material matter, and therefore prejudicial to some one; that otherwise, however willful it might be, it did not constitute perjury. See, also, 3 Wharton's Cr. Law, Sec. 2228; 2 Russ. on Crimes, p. 600; *Hinch vs. State*, 2 Miss., p. 158; *Campbell vs. People*, 8 Wend., p. 636; *Conner vs. Com.*, 2 Va. Cases, p. 30; *Com. vs. Knight*, 12 Mass., p. 274.

Oath
denied.

119. The term "oath," as used in the last section, includes an affirmation, and every other mode authorized by law of attesting the truth of that which is stated.

NOTE.—See Sec. 7, Subd. 16; 4 Bl. Com., pp. 137 to 139; 2 Chitty's Cr. Law, Chap. 9.

Oath of
office.

120. So much of an oath of office as relates to the future performance of official duties is not such an oath as is intended by the two preceding sections.

NOTE.—*State vs. Dayton*, 3 Zab., p. 49. The definition of perjury cannot properly include the violation of an oath of office by misconduct in the office. The official oath *should* serve a valuable purpose in giving point and depth to the sense of public duty which every person intrusted with the discharge of official responsibility owes to the community, but it cannot be a convenient mode of punishing official misconduct to treat it as involving a breach of the oath of office, punisha-

ble as perjury. The act which violates the official duty should be declared criminal, and the punishment should be affixed to the act itself.

121. It is no defense to a prosecution for perjury that the oath was administered or taken in an irregular manner. Irregularity in administering.

NOTE.—3 Wharton's Cr. Law, Secs. 2205-7. Two classes of cases are important to be considered. One class is, where an oath is administered in an irregular manner, but the person taking it supposes at the time that all the formalities of law are being complied with. Such were the circumstances in *People vs. Cook*, 4 Seld., p. 67, where challenged voters were sworn upon a copy of Watts' Psalms and Hymns, the book being supposed to be the Bible. As to these cases, the decision in *People vs. Cook* is, that the oath is valid, and the party is as amenable to the consequences of perjury as if it had been administered in strict conformity to the statute. Another class of cases is, where the person taking the oath evades some formality of the oath with intent to escape its obligation; as where he kisses his thumb instead of the book. In these cases his fraud should not be permitted to secure him against punishment. The section in the text therefore prescribes the same rule for both classes.

122. It is no defense to a prosecution for perjury that the accused was not competent to give the testimony, deposition, or certificate of which falsehood is alleged. It is sufficient that he did give such testimony or make such deposition or certificate. Incompetency of witness no defense.

NOTE.—3 Wharton's Cr. Law, Secs. 2209, 2224; *Montgomery vs. State*, 10 Ohio, p. 220; *Van Steenberg vs. Kortz*, 10 Johns., p. 167; *Rich vs. Newell*, 3 Yea., p. 414.

123. It is no defense to a prosecution for perjury that the accused did not know the materiality of the false statement made by him; or that it did not, in fact, affect the proceeding in or for which it was made. It is sufficient that it was material, and might have been used to affect such proceeding. Witnesses' knowledge of materiality of his testimony not necessary.

Making
deposi-
tions, etc.,
when
deemed
complete.

124. The making of a deposition or certificate is deemed to be complete, within the provisions of this Chapter, from the time when it is delivered by the accused to any other person, with the intent that it be uttered or published as true.

Statement
of that
which one
does not
know to
be true.

125. An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false.

NOTE.—See, in support of the rule prescribed in this section, *People vs. McKinney*, 3 Park Cr., p. 511; *Bennett vs. Judson*, 21 N. Y., p. 238; *Commonwealth vs. Cornish*, 6 Binn., p. 249; *Steinman vs. McWilliams*, 6 Penn. St., p. 170; 3 Wharton Cr. Law, Sec. 2201; and opposed to it, *United States vs. Shellmire*, Baldw., p. 370.

Punish-
ment of
perjury.

126. (§ 82.) Perjury is punishable by imprisonment in the State Prison not less than one nor more than fourteen years.

Suborna-
tion of
perjury.

127. (§ 82.) Every person who willfully procures another person to commit perjury is guilty of subornation of perjury, and is punishable in the same manner as he would be if personally guilty of the perjury so procured.

NOTE.—The party charged must procure the commission of perjury, by inciting, instigating, or persuading the witness to commit the offense.—2 Russ. on Crimes, p. 596; *Com. vs. Douglass*, 5 Met., p. 341; 3 Wharton's Cr. Law, Sec. 2283; 2 Bishop's Cr. Law, Sec. 887. Though the party charged with subornation of perjury knew that the testimony of a witness whom he called would be false, yet if he did not know that the witness would willfully testify to a fact knowing it to be false, he cannot be convicted.—*Com. vs. Douglass*, 5 Met., p. 241.

Procuring
the
execution
of
innocent
person.

128. (§ 83.) Every person who, by willful perjury or subornation of perjury, procures the conviction and execution of any innocent person, is punishable by death.

NOTE.—This section is founded on the 83d of the crimes and punishment Act which declares that any

person so procuring the conviction and execution of an innocent person "*shall be deemed guilty of murder.*" The offense certainly does not fall within any known definition of murder, and is repugnant to the definition of murder given in our statutes. The Commission have therefore deemed it advisable to omit the words quoted, and to affix the punishment to the act itself.

CHAPTER VI.

FALSIFYING EVIDENCE.

SECTION 132. Offering false evidence.

133. Deceiving a witness.

134. Preparing false evidence.

135. Destroying evidence.

136. Preventing or dissuading witness from attending.

137. Bribing witnesses.

138. Taking or offering to take bribes.

132. Every person who upon any trial, proceeding, inquiry, or investigation whatever, authorized or permitted by law, offers in evidence, as genuine or true, any book, paper, document, record, or other instrument in writing, knowing the same to have been forged or fraudulently altered or ante-dated, is guilty of felony. Offering
false
evidence.

133. Every person who practices any fraud or deceit, or knowingly makes or exhibits any false statement, representation, token, or writing, to any witness or person about to be called as a witness upon any trial, proceeding, inquiry, or investigation whatever, authorized by law, with intent to affect the testimony of such witness, is guilty of a misdemeanor. Deceiving
a witness.

134. Every person guilty of preparing any false or ante-dated book, paper, record, instrument in writing, or other matter or thing, with intent to produce it, or allow it to be produced for any fraudulent Preparing
false
evidence.

or deceitful purpose, as genuine or true, upon any trial, proceeding, or inquiry whatever, authorized by law, is guilty of felony.

NOTE.—The Tracy Peerage case (10 Cl. & F., p. 154), though involving no points of criminal law, supplies an illustration relevant to this subject. In that case a claimant to a peerage produced manuscript entries in a prayer book, alleged to be of ancient date; and, at a very late stage of the proceeding, called witnesses to testify to an inscription upon a tombstone, tending to make out the pedigree necessary to the claimant's case. The tombstone itself could not be produced; and, the circumstances of the case involving suspicion, the claim was dismissed; Lord Campbell expressing his conviction that the case was founded on fraud and forgery.

Destroying
evidence.

135. Every person who, knowing that any book, paper, record, instrument in writing, or other matter or thing, is about to be produced in evidence upon any trial, inquiry, or investigation whatever, authorized by law, willfully destroys or conceals the same, with intent thereby to prevent it from being produced, is guilty of a misdemeanor.

Preventing
or
dissuading
witness
from
attending.

136. Every person who willfully prevents or dissuades any person who is or may become a witness, from attending upon any trial, proceeding, or inquiry, authorized by law, is guilty of a misdemeanor.

Bribing
witnesses.

137. Every person who gives or offers, or promises to give, to any witness, or person about to be called as a witness, any bribe, upon any understanding or agreement that the testimony of such witness shall be thereby influenced, or who attempts by any other means fraudulently to induce any person give false or withhold true testimony, is guilty of a felony.

Taking or
offering to
take
bribes.

138. Every person who is a witness, or is about to be called as such, who receives, or offers to receive, any bribe, upon any understanding that his testimony shall be influenced thereby, or that he will absent himself from the trial or proceeding upon which his testimony is required, is guilty of a felony.

from the trial or proceeding upon which his testimony is required, is guilty of a misdemeanor.

NOTE.—The preceding Chapter is founded upon Section 3 of the Act of April 27th, 1863 (Stats. 1863, p. 645), and Sections 84 and 86 of the Crimes and Punishment Act, as amended by the Act cited.

CHAPTER VII.

OTHER OFFENSES AGAINST PUBLIC JUSTICE.

SECTION 142. Officer refusing to receive or arrest parties charged with crime.

143. Public Administrator, neglect of duty or violation of duty by.

144. Receiving fee or compensation for services rendered in arresting fugitives from justice.

145. Delaying to take person arrested before a magistrate.

146. Making arrests, etc., without lawful authority.

147. Inhumanity to prisoners.

148. Resisting public officers in the discharge of their duties.

149. Assaults, etc., by officers, under color of authority.

150. Refusing to aid officers in arrest, etc.

151. Taking extra-judicial oaths.

152. Administering extra-judicial oaths.

153. Compounding crimes.

154. Debtor fraudulently concealing his property.

155. Defendant fraudulently concealing his property.

156. Fraudulent pretenses relative to birth of infant.

157. Substituting one child for another.

158. Common barratry defined. How punished.

159. What proof is required.

160. Misconduct by attorneys.

161. Buying demands or suit by an attorney.

162. Attorneys forbidden to defend prosecutions carried on by their partners or formerly by themselves.

163. Limitation of preceding section.

164. Grand juror acting after challenge has been allowed.

165. Bribing members of Common Councils, Boards of Supervisors, or Trustees.

166. Criminal contempts.

167. False certificates by public officers.

168. Disclosing fact of indictment or presentment having been found or made.

SECTION 169. Grand juror disclosing what transpired before the grand jury.

170. Maliciously procuring search warrant.

171. Unauthorized communication with convict in the State Prison.

172. Keeping liquor within two miles of State Prison.

173. Importing foreign convicts.

174. Bringing Chinese into the State.

175. Separate and distinct prosecutions.

176. Omission of duty by public officer.

177. Commission of prohibited acts, when no penalty is prescribed.

Officer
refusing to
receive or
arrest
parties
charged
with
crime.

142. (§ 100.) Every Sheriff, Coroner, keeper of a jail, Constable, or other peace officer, who willfully refuses to receive or arrest any person charged with a criminal offense, is punishable by fine not exceeding five thousand dollars, and imprisonment in the County Jail not exceeding five years.

Public
Adminis-
trator,
neglect of
duty or
violation of
duty by.

143. Every person holding the office of Public Administrator, who willfully refuses or neglects to perform the duties thereof, or who violates any provision of law relating to his duties or the duties of his office, for which some other punishment is not prescribed, is punishable by fine not exceeding five thousand dollars, or imprisonment in the County Jail not exceeding two years, or both.

Receiving
fee or com-
pensation
for
services
rendered in
arresting
fugitives
from
justice.

NOTE.—Stats. 1851, p. 488, Sec. 303.

144. Every person who violates any of the provisions of Section 1558 is guilty of a misdemeanor.

NOTE.—The section referred to relates to fees or compensation allowed persons for pursuing and securing the extradition of fugitives from justice.

Delaying
to take
person
arrested
before a
magistrate.

145. Every public officer or other person, having arrested any person upon a criminal charge, who willfully delays to take such person before a magistrate having jurisdiction, to take his examination, is guilty of a misdemeanor.

NOTE.—This section is intended to enforce the well understood duty of officers or private persons who have

made arrests. The arrested person is entitled to a speedy hearing upon the charge preferred against him. The subject might indeed be considered covered, so far as public officers are concerned, by the general provisions elsewhere reported (Sec. 176), making it a misdemeanor for an officer willfully to omit an official duty. But there would still remain cases in which a private person is authorized to make an arrest.

146. Every public officer, or person pretending to be a public officer, who, under the pretense or color of any process or other legal authority, arrests any person or detains him against his will, or seizes or levies upon any property, or dispossesses any one of any lands or tenements, without a regular process or other lawful authority therefor, is guilty of a misdemeanor.

Making arrests, etc., without lawful authority.

147. (§ 88.) Every officer who is guilty of willful inhumanity or oppression toward any prisoner under his care or in his custody, is punishable by fine not exceeding two thousand dollars, and by removal from office.

Inhumanity to prisoners.

NOTE.—See note to Sec. 149.

148. (§ 92.) Every person who willfully resists, delays, or obstructs any public officer, in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed, is punishable by fine not exceeding five thousand dollars, and imprisonment in the County Jail not exceeding five years.

Resisting public officers in the discharge of their duties.

NOTE.—Stats. 1860, p. 125, Sec. 1; Crumpton vs. Newman, 12 Ala., p. 199; State vs. Lovett, 3 Vt., p. 110; State vs. Hailey, 2 Strob., p. 73; State vs. Henderson, 15 Mo., p. 486; State vs. Noyes, 25 Vt., p. 415; 2 Bishop's Cr. Law, Secs. 857-859.

149. (§ 92.) Every public officer who, under color of authority, without lawful necessity, assaults or beats any person, is punishable by fine not exceeding five thousand dollars, and imprisonment in the County Jail not exceeding five years.

Assaults, etc., by officers, under color of authority.

NOTE.—Stats. 1860, p. 125, Sec. 1; Harrison vs. Hodgson, 10 B. & C., p. 445; 2 Wharton Cr. Law, Sec. 1260; People vs. Gulick, Hill & Denio, p. 229.

Refusing
to aid
officers in
arrest, etc.

150. (§ 128.) Every male person above eighteen years of age who neglects or refuses to join the posse comitatus or power of the county, by neglecting or refusing to aid and assist in taking or arresting any person against whom there may be issued any process, or by neglecting to aid and assist in retaking any person who, after being arrested or confined, may have escaped from such arrest or imprisonment, or by neglecting or refusing to aid and assist in preventing any breach of the peace, or the commission of any criminal offense, being thereto lawfully required by any Sheriff, Deputy Sheriff, Coroner, Constable, Judge, or Justice of the Peace, or other officer concerned in the administration of justice, is punishable by fine of not less than fifty nor more than one thousand dollars.

Taking
extra-
judicial
oaths.

~~151. Every person who takes an oath before an officer or person authorized by law to administer oaths, except when such oath is required or authorized by law, or is required by the provisions of some contract as the basis of or in proof of a claim, or when the same has been agreed to be received by some person as proof of any fact in the performance of any contract, obligation, or duty, instead of other evidence, is guilty of a misdemeanor.~~

Adminis-
tering
extra-
judicial
oaths.

~~152. Every officer who administers an oath to another person, or who makes and delivers any certificate that another person has taken an oath, except when such oath is required or authorized by law, or is required by the provisions of some contract as a basis of or in proof of a claim, or when the same has been agreed to be received by some person as a proof of any fact in the performance of any contract, obliga-~~

~~tion, or duty, instead of other evidence, is guilty of a misdemeanor.~~

NOTE.—It is known that, in many cases, persons employ the sanctity of a judicial oath to gain credence for their statements, yet escape punishment for falsity in those statements because the penalties of perjury do not extend to mere voluntary oaths. Sworn statements are frequently published to advance the sales of a particular article, or to support one side in a public controversy. It is the intention of the two sections above to restrict the practice of taking or administering these voluntary oaths. The provisions allow affidavits to be made in proof of loss under policies of insurance; in proof of facts necessary to show title between vendor and purchaser of real property; and in all the other cases where there is an agreement to receive them instead of pursuing the ordinary methods of legal investigation. And by antecedent provisions of this Code, the penalties of perjury are extended to willful false swearing in these cases, as well as in cases where the oath is required by law. See Sec. 118 and note.

153. (§ 101.) Every person who, having knowl-
edge of the actual commission of a crime, takes money
or property of another, or any gratuity or reward, or
any engagement, or promise thereof, upon any agree-
ment or understanding to compound or conceal such
crime, or to abstain from any prosecution thereof, or to
withhold any evidence thereof, except in the cases
provided for by law, in which crimes may be compro-
mised by leave of Court, is punishable as follows:

Compound-
ing crimes.

1. By imprisonment in the State Prison not exceed-
ing five years, or in a County Jail not exceeding one
year, where the crime was punishable by death or im-
prisonment in the State Prison for life;

2. By imprisonment in the State Prison not exceed-
ing three years, or in the County Jail not exceeding
six months, where the crime was punishable by im-
prisonment in the State Prison for any other term than
for life;

3. By imprisonment in the County Jail not exceed-

ing six months, or by fine not exceeding five hundred dollars, where the crime was a misdemeanor.

NOTE.—This section was compiled from Sec. 101 of the Crimes and Punishment Act, and Sec. 257 of the Criminal Practice Act (Stats. 1850, p. 229; 1851, p. 212), with the punishment graduated in proportion to the enormity of the offense compounded.—Jones vs. Rice, 13 Pick., p. 440; 4 Bl. Com., pp. 134–136.

Debtor
fraudul-
ently con-
cealing his
property.

154. (§ 134.) Every debtor who fraudulently removes his property or effects out of this State, or fraudulently sells, conveys, assigns, or conceals his property, with intent to defraud, hinder, or delay his creditors of their rights, claims, or demands, is punishable by imprisonment in the County Jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both.

Defendant
fraudul-
ently con-
cealing his
property.

155. (§ 135.) Every person against whom an action is pending, or against whom a judgment has been rendered for the recovery of any personal property, who fraudulently conceals, sells, or disposes of such property, with intent to hinder, delay, or defraud the person bringing such action or recovering such judgment, or with such intent removes such property beyond the limits of the county in which it may be at the time of the commencement of such action or the rendering of such judgment, is punishable as provided in the preceding section.

Fraudulent
pretenses
relative to
birth of
infant.

156. Every person who fraudulently produces an infant, falsely pretending it to have been born of any parent whose child would be entitled to inherit any real estate or to receive a share of any personal estate, with intent to intercept the inheritance of any such real estate, or the distribution of any such personal estate from any person lawfully entitled thereto, is punishable by imprisonment in the State Prison not exceeding ten years.

157. Every person to whom an infant has been confided for nursing, education, or any other purpose, who, with intent to deceive any parent or guardian of such child, substitutes or produces to such parent or guardian another child in the place of the one so confided, is punishable by imprisonment in the State Prison not exceeding seven years.

Substituting one child for another.

158. Common barratry is the practice of exciting groundless judicial proceedings, and is punishable by imprisonment in the County Jail not exceeding six months and by fine not exceeding five hundred dollars.

Common barratry defined.

How punished

NOTE.—Common barratry is defined by Blackstone to be the offense of frequently exciting and stirring up suits and quarrels between His Majesty's subjects, either at law or otherwise.—4 Black. Com., p. 134; see, also, 1 Hawk. P. C., p. 243.

159. No person can be convicted of common barratry except upon proof that he has excited suits or proceedings at law in at least three instances, and with a corrupt or malicious intent to vex and annoy.

What proof is required.

160. Every attorney who, whether as attorney or as counselor, either:

Misconduct by attorneys.

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the Court or any party; or,
 2. Willfully delays his client's suit with a view to his own gain; or,
 3. Willfully receives any money or allowance for or on account of any money which he has not laid out or become answerable for;
- Is guilty of a misdemeanor.

161. Every attorney who, either directly or indirectly, buys or is interested in buying any evidence of debt or thing in action, with intent to bring suit thereon, is guilty of a misdemeanor.

Buying demands or suit by an attorney.

NOTE.—The purchasing of a suit or right of suing, was “a practice so much abhorred by our law,” says Justice Blackstone (4 Com., pp. 135, 136), “that it is one main reason why a chose in action is not assignable at common law, because no man should purchase any pretense to sue in another’s right.” The same learned writer (4 Com., p. 136) styles persons engaged in such practices “pests of civil society.” No attorney of standing in the profession will engage in the infamous business prohibited by Section 161, and society ought to be protected against any attorney who will so far degrade his profession as to engage in such transactions.

Attorneys
forbidden
to defend
prosecu-
tions
carried on
by their
partners or
formerly
by
themselves

162. Every attorney who directly or indirectly advises in relation to, or aids, or promotes the defense of any action or proceeding in any Court, the prosecution of which is carried on, aided, or promoted by any person as District Attorney or other public prosecutor, with whom such person is directly or indirectly connected as a partner; or who, having himself prosecuted or in any manner aided or promoted any action or proceeding in any Court as District Attorney or other public prosecutor, afterwards, directly or indirectly, advises in relation to or takes any part in the defense thereof, as attorney or otherwise, or who takes or receives any valuable consideration from or on behalf of any defendant in any such action, upon any understanding or agreement whatever having relation to the defense thereof, is guilty of a misdemeanor, and in addition to the punishment prescribed therefor, forfeits his license to practice law.

Limitation
of
preceding
section.

163. The preceding section does not prohibit an attorney from defending himself in person, as attorney or counsel, when prosecuted, either civilly or criminally.

Grand
juror
acting
after
challenge
has been
allowed.

164. Every Grand Juror who, with knowledge that a challenge interposed against him by a defendant has been allowed, is present at or takes part or attempts to take part in the consideration of the charge against

the defendant who interposed the challenge, or the deliberations of the Grand Jury thereon, is guilty of a misdemeanor.

165. (§§ 84, 85.) Every person who gives or offers a bribe to any member of any Common Council, Board of Supervisors, or Board of Trustees of any county, city, or corporation, with intent to corruptly influence such member in his action on any matter or subject pending before the body of which he is a member, and every member of either of the bodies mentioned in this section who receives or offers to receive any such bribe, is punishable by imprisonment in the State Prison for a term not less than one nor more than fourteen years, and is disqualified from holding any office in this State.

Bribing
members of
Common
Councils,
Boards of
Supervi-
sors, or
Trustees.

NOTE.—Stats. 1863, p. 645, Secs. 1, 2.

166. Every person guilty of any contempt of Court, of either of the following kinds, is guilty of a misdemeanor:

Criminal
contempts.

1. Disorderly, contemptuous, or insolent behavior committed during the sitting of any Court of justice, in immediate view and presence of the Court, and directly tending to interrupt its proceedings or to impair the respect due to its authority;

2. Behavior of the like character committed in the presence of any referee, while actually engaged in any trial or hearing, pursuant to the order of any Court, or in the presence of any jury while actually sitting for the trial of a cause, or upon any inquest or other proceedings authorized by law;

3. Any breach of the peace, noise, or other disturbance directly tending to interrupt the proceedings of any Court;

4. Willful disobedience of any process or order lawfully issued by any Court;

Same.

5. Resistance willfully offered by any person to the lawful order or process of any Court;

6. The contumacious and unlawful refusal of any person to be sworn as a witness; or, when so sworn, the like refusal to answer any material question;

7. The publication of a false or grossly inaccurate report of the proceedings of any Court;

8. Presenting to any Court having power to pass sentence upon any prisoner under conviction, or to any member of such Court, any affidavit or testimony or representation of any kind, verbal or written, in aggravation or mitigation of the punishment to be imposed upon such prisoner, except as provided in this Code.

NOTE.—The power to proceed against persons for contempt is incident to every judicial tribunal, derived from its very constitution, without any express statutory aid.—Yates vs. Lansing, 19 Johns., p. 395; 6 Johns., p. 337; 4 Johns., p. 317; Mariner vs. Dyer, 2 Greenl., p. 165; State vs. Tipton, 1 Black., p. 166; Clark vs. People, 1 Broese, p. 266; People vs. Turner, 1 Cal., p. 15; United States vs. Hudson, 7 Cranch, p. 32; Morrison vs. McDonald, 21 Maine, p. 550; State vs. Woodfin, 5 id., p. 199; Gates v. McDaniel, 3 Port., p. 356; Gorham vs. Lockett, 6 B. Monr., p. 638; Stuart vs. People, 3 Scam., p. 395.

False
certificates
by public
officers.

167. Every public officer authorized by law to make or give any certificate or other writing, who makes and delivers as true any such certificate or writing, containing statements which he knows to be false, is guilty of a misdemeanor.

Disclosing
fact of
indictment
or present-
ment
having
been found
or made.

168. Every Grand Juror, District Attorney, Clerk, Judge, or other officer, who, except by issuing or in executing a warrant of arrest, willfully discloses the fact of a presentment or indictment having been made for a felony, until the defendant has been arrested, is guilty of a misdemeanor.

NOTE.—This section is founded upon Secs. 223 and 224 of the Criminal Practice Act (Stats. 1851, p. 212).

See
1203
1203
1204

extended to embrace indictments as well as presentments, the reason of the rule applying with as much force to one as to the other.

169. Every Grand Juror who, except when required by a Court, willfully discloses any evidence adduced before the Grand Jury, or anything which he himself or any other member of the Grand Jury may have said, or in what manner he or any other Grand Juror may have voted on a matter before them, is guilty of a misdemeanor.

Grand juror disclosing what transpired before the grand jury.

170. Every person who maliciously and without probable cause procures a search warrant or warrant of arrest to be issued and executed, is guilty of a misdemeanor.

Maliciously procuring search warrant.

171. Every person, not authorized by law, who, without the consent of the Warden, or other officer in charge of the State Prison, communicates with any convict therein, or brings into or conveys out of the State Prison any letter or writing to or from any convict, is guilty of a misdemeanor.

Unauthorized communication with convict in the State Prison.

172. Every person who, within two miles of the land belonging to this State, upon which the State Prison is situated, keeps, sells, gives away, or offers for sale any vinous, malt, or spirituous liquors, is guilty of a misdemeanor.

Keeping liquor within two miles of State Prison.

NOTE.—Stats. 1855, p. 108, Secs. 1, 2.

173. Every Captain, Master of a vessel, or other person, who willfully imports, brings, or sends, or causes or procures to be brought or sent, into this State, any person who is a foreign convict of any crime which, if committed within this State, would be punishable therein (treason and misprision of treason excepted), or who is delivered or sent to him from any prison or place of confinement in any place without this State, is guilty of a misdemeanor.

Importing foreign convicts.

NOTE.—Based upon the Act of 1850, in relation to the importation of convicts.—Stats. 1850, p. 202, Secs. 1, 2.

Bringing
Chinese
into the
State.

174. Every person bringing to or landing within this State any person born either in the Empire of China or Japan, or the islands adjacent to the Empire of China, without first presenting to the Commissioner of Immigration evidence satisfactory to such Commissioner that such person desires voluntarily to come into this State and is a person of good character, and obtaining from such Commissioner a permit describing such person and authorizing the landing, is punishable by a fine of not less than one nor more than five thousand dollars, or by imprisonment in the County Jail not less than two nor more than twelve months.

NOTE.—This section embodies the material penal provisions of the Act to prevent the kidnapping and importation of Mongolian females for criminal purposes, and the kindred Act of March 18th, 1870.—Stats. 1870, p. 330, et seq. The provisions of this section are broad enough to include every offense defined in either Act.

Separate
and
distinct
prosecu-
tions.

175. Every individual person of the classes referred to in the two preceding sections, brought to or landed within this State contrary to the provisions of such sections, renders the person bringing or landing liable to a separate prosecution and penalty.

Omission
of duty by
public
officer.

176. Every willful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision shall have been made for the punishment of such delinquency, is punishable as a misdemeanor.

Commis-
sion of
prohibited
acts,
when no
penalty is
prescribed.

177. When an act or omission is declared by a statute to be a public offense, and no penalty for the offense is prescribed in any statute, the act or omission is punishable as a misdemeanor.

2 new sections : —
in 8

CHAPTER VIII.

CONSPIRACY.

SECTION 182. Criminal conspiracy defined and punishment fixed.

183. No other conspiracies punishable criminally.

184. Overt act, when necessary.

182. If two or more persons conspire:

1. To commit any crime;
2. Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime;
3. Falsely to move or maintain any suit, action, or proceeding;
4. To cheat and defraud any person of any property by any means which are in themselves criminal, or to obtain money or property by false pretenses; or,
5. To commit any act injurious to the public health, to public morals, or for the perversion or obstruction of justice, or due administration of the laws;

They are punishable by imprisonment in the County Jail not exceeding one year, or by fine not exceeding one thousand dollars, or both.

~~Administration of the laws;~~

~~—They are punishable by imprisonment in the County Jail not exceeding one year, or by fine not exceeding one thousand dollars.~~

NOTE.—Hawkins says that conspiracy is a consultation and agreement between two or more persons, either falsely to charge another with a crime, punishable by law, or wrongfully to injure or prejudice a third person, or any body of men in any other manner; or to commit any punishable offense by law; or to do any act with intent to prevent the course of justice; or to effect a legal purpose with a corrupt intent or by improper means.—Hawk. P. C., Chap. 72, Sec. 2. Archbold defines conspiracy to be "an agreement between two or more persons: 1. Falsely to charge another with a crime punishable by law. 2. Wrongfully to injure or prejudice a third person, or any body of men in any manner. 3. To commit any offense punishable by law. 4. To do any act with intent to

riminal
conspiracy
defined and
punish-
ment fixed.

Each's P. C. 174-175
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prevent the course of justice. 5. To effect a legal purpose with a corrupt intent, or by improper means. 6. Combination by journeymen to raise their wages."—Arch. Cr. Pl., pp. 390-1. In *The State vs. Buchanan*, 5 Har & J., pp. 317, 351, it is said that, by a course of decisions running through a space of more than four hundred years, from the reign of Edward III to 59 George III, without a single conflicting adjudication, these points are clearly settled. That a conspiracy to do any act criminal per se is an indictable offense at common law. That an indictment will lie at common law: 1. For a conspiracy to do an act not illegal, nor punishable if done by an individual, but immoral only. 2. For a conspiracy to do an act, neither illegal nor immoral in an individual, but to effect a purpose which has a tendency to prejudice the public; e. g., a combination by workmen to raise their wages. 3. For a conspiracy to extort money from another, or to injure his reputation by means not indictable, if practiced by an individual, or by verbal defamation, and that whether it be to charge him with an indictable offense or not. 4. For a conspiracy to cheat and defraud a third person, accomplished by means of an act which would not in law amount to an indictable cheat, if effected by an individual. 5. For a malicious conspiracy to impoverish, or ruin a third person in his trade, or profession. 6. For a conspiracy to defraud a third person by means of an act not per se unlawful, and though no person be thereby injured. 7. For a bare conspiracy to cheat or defraud a third person, though the means of effecting it could not be determined on at the time.

No other
conspiracies
punishable
criminally.

183. (§ 103.) No conspiracies, other than those enumerated in the preceding section, are punishable criminally.

Overt act,
when
necessary.

184. (§ 104.) No agreement, except to commit a felony upon the person of another, or to commit arson, or burglary, amounts to a conspiracy, unless some act, beside such agreement, be done to effect the object thereof, by one or more of the parties to such agreement.

NOTE.—The rule of the section is a restriction of the rule of common law. By that rule the gist of conspiracy is the unlawful confederating; and the act is complete when the confederacy is made. Any act

185. It shall be unlawful for any person to wear any mask, false whiskers, or any personal disguise (whether complete or partial) for the purpose of:

1. Evading or escaping discovery, recognition, or identification in the commission of any public offense;
 2. Concealment, flight, or escape, when charged with, arrested for, or convicted of, any public offense.
- Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor.

cases, precede the proof of individual acts.—Reg. vs. Brittain, 11 L. T., p. 48; 3 Cox Cr. Cas., p. 77. As to whether the misdemeanor of conspiracy to commit a felony is to be deemed merged in the felony when subsequently committed, see Commonwealth vs. Fisher, 5 Mass., p. 106; Lambert vs. People, 9 Cow., p. 620; Rey vs. Button, 3 Cox Cr. Cas., p. 229; and 18 L. J. M. C., p. 19.

TITLE VIII.

OF CRIMES AGAINST THE PERSON.

CHAPTER I. *Homicide.*

II. *Mayhem.*

III. *Kidnapping.*

IV. *Robbery.*

V. *Attempts to kill.*

VI. *Assaults with intent to commit felony, other than assaults with intent to murder.*

VII. *Duels and challenges.*

VIII. *False imprisonment.*

IX. *Assault and battery.*

X. *Libel.*

CHAPTER I.

HOMICIDE.

SECTION 187. Murder defined.

188. Malice defined.

189. Degrees of murder.

190. Punishment of murder.

191. Petit treason abolished.

192. Manslaughter defined. Voluntary and involuntary manslaughter.

193. Punishment of manslaughter.

194. Deceased must die within a year and a day.

195. Excusable homicide.

196. Justifiable homicide by public officers.

197. Justifiable homicide by other persons.

198. Bare fear not to justify killing.

199. Justifiable and excusable homicide not punishable.

Murder
defined.

187. Murder is the unlawful killing of a human being, with malice aforethought.

NOTE.—"Murder is the unlawful killing of a human being, with malice aforethought, *either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned.*"—Stats. 1850, p. 23, Sec. 19. "Express or implied"—these words are omitted, for they are included within the term "malice," and by the next section it is declared that malice, which is the ingredient of murder, may be expressed or implied. The sentence italicized is omitted, because it is surplusage. Every unlawful killing with malice aforethought being murder, it follows that any such killing effected by any means is murder. Murder, in the language of Hawkins, is defined to be "the willful killing of any subject whatsoever, through malice aforethought."—1 Hawk. P. C., Sec. 3. Russell says "murder is the killing of any person under the King's peace, with malice prepense or aforethought, either express or implied by law."—1 Russell on Crimes, p. 421. Sir Edward Coke (3 Inst., p. 47) describes the offense to be "when a person of sound mind and discretion unlawfully killeth any reasonable creature in being, and under the King's peace, with malice aforethought, either express or implied." Blackstone accepts the description of murder as given by Coke. 4 Bl. Com., p. 196; see, also, 2 Wharton's Cr. Law, Sec. 930. But

187. The term murder has but one meaning, and that is, the unlawful killing of a human being with malice aforethought, either express or implied. People v. Haun, 44 Cal. 96.

"a better definition," says Mr. Bishop (2 Bishop's Cr. Law, Sec. 652), "is the following: murder is any act committed from what the law deems a depraved mind, bent fully on evil, the result of which act is the death of a human being within a year and a day from the time of its commission." It is murder if the wound is inflicted with a felonious intent, and death ensue from the effects of the wound within a year and a day.—People vs. Steventon, 9 Cal., p. 273. A child within its mother's womb is not a "human being" within the meaning of that term as used in defining murder. The rule is that it must be born.—Rex vs. Brain, 6 Car. & P., p. 349. That every part of it must have come from the mother before the killing of it will constitute a felonious homicide.—Rex vs. Brain, 6 Car. & P., p. 349; Rex vs. Crutchley, 7 Car. & P., p. 814; Rex vs. Sellis, 7 Car. & P., p. 850; Rex vs. Poulton, 5 Car. & P., p. 329; 2 Bishop's Cr. Law, Secs. 541, 542.

188. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. Malice defined.

NOTE.—This section is based upon Section 20 of the Act of 1850 (Stats. 1850, p. 231), and part of Section 21 of same Act, as amended in 1856.—Stats. 1856, p. 219. Section 20 is as follows: "Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances, capable of proof." This section did not pretend to define implied malice, but in Section 21, which was denoted chiefly to a division of murder into degrees, it is declared that "malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." It is very clear that neither definition is complete when the term malice is used in a general sense, as it is used in the sections cited. The Commission have placed the definition of malice express and malice implied in the same section, and limited the definition to that malice which is an ingredient of murder; they omit from the definition of express malice the phrase "by external circumstances

188. If homicide is committed by means of willful, deliberate, and premeditated killing, it shows an abandoned and malignant heart. People v. Williams, 43 Cal. 344.

capable of proof," for that phrase performs no office in the section, and constitutes at best a very indifferent definition of the word "manifested," which precedes it.

"Malice in a legal sense means a wrongful act done intentionally without just cause or excuse."—*Maynard vs. F. F. Ins. Co.*, 34 Cal., p. 48. See Sec. 7, Subd. 4, for a general definition of malice.

Degrees of murder.

189. All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree; and all other kinds of murders are of the second degree.

NOTE.—This section is founded upon Sec. 21 of the Crimes and Punishment Act, as amended by the Act of 1856.—Stats. 1856, p. 219. The Commission made no material change in the language. They have taken from Sec. 21 the definition of implied malice and the clause fixing the punishment of murder and the provision for determining the degree, and inserted them in this work, in their appropriate places. At common law every unlawful killing of a human being, with malice aforethought, was punishable by death, but as such killings differed greatly from each other in the degree of atrociousness, the manifest injustice of involving them all in the same punishment led to the enactment of statutes dividing murder into two degrees, and affixing to murders of the second degree milder punishments than to those of the first. Among the first enactments to this end was the Pennsylvania statute of April 22d, 1794, of which ours is a copy. Since the enactment of the former, no subject has been the source of more patient judicial investigation than the distinction between the two degrees of murder. The jurist and the student, in passing over the numerous adjudications upon this most important subject, found it involved in obscurity. After all that had been written upon this topic, it remained for the Supreme Court of this State to be the first to draw the distinction between the two degrees of murder, in language so clear, explicit, and satisfactory as to put the matter forever at rest. In *The People vs. Vincente Sanchez*, 24 Cal., p. 29, Chief Justice Sanderson, speaking for the Court, says: "In dividing murder into two degrees, the Legislature in-

The statute dividing murder into degrees does not make murder in the second degree less or other than murder. *People v. Haun*, 44 Cal. 96. To constitute murder in the first degree there must be deliberation and premeditation. *People v. Valencia*, 43 Cal. 552. In deliberating there need be no appreciable time between the intention to kill and the act of killing. *People v. ...*

tended to assign to the first, as deserving of greater punishment, all murders of a cruel and aggravated character; and to the second, all other kinds of murder which are murder at common law; and to establish a test by which the degree of every case of murder may be readily ascertained. That test may be thus stated: Is the killing willful (that is to say, intentional), deliberate, and premeditated? If it is, the case falls within the first, and if not, within the second degree. There are certain kinds of murder which carry with them conclusive evidence of premeditation. These the Legislature has enumerated in the statute, and has taken upon itself the responsibility of saying that they shall be deemed and held to be murder of the first degree. These cases are of two classes. First, where the killing is perpetrated by means of poison, etc. Here the *means* used is held to be conclusive evidence of premeditation. The second is, where the killing is done in the perpetration or the attempt to perpetrate some one of the felonies enumerated in the statute. Here the *occasion* is made conclusive evidence of premeditation. Where the case comes within either of these classes, the test question—'Is the killing willful, deliberate, and premeditated?'—is answered by the statute itself, and the jury have no option but to find the prisoner guilty in the first degree. Hence, so far as these two classes are concerned, all difficulty as to the question of degree is removed by the statute. But there is another and much larger class of cases included in the definition of murder in the first degree, which are of equal cruelty and aggravation with those enumerated, and which, owing to the different and countless forms which murder assumes, it is impossible to describe in the statute. In this class the Legislature leaves the jury to determine, from all the evidence before them, the degree of crime, but prescribes for the government of their deliberations, the same test which has been used by itself in determining the degree of the other two classes, to wit: the deliberate and preconceived intent to kill. Thus the three classes of cases which constitute murder of the first degree are made to stand upon the same principle. It is only in the latter class of cases that any difficulty is experienced in drawing the distinction between murder of the first and murder of the second degree, and this difficulty is more apparent than real. The unlawful killing must be accompanied with a deliberate and clear intent to take life, in order to constitute murder of the first degree. The intent to kill must be the result of deliberate premeditation; it must

190. Every person guilty of murder in the first degree, shall suffer death or confinement in the State Prison for life, at the discretion of the jury, trying the same; or upon a plea of guilty, the Court shall determine the same; and every person guilty of murder in the second degree, is punishable by imprisonment in the State Prison not less than ten years. [Approved March 28, 1874. Effect immediately.]

Punishment of murder.

~~190~~ (§ 21.) Every person guilty of murder in the first degree shall suffer death, and every person guilty of murder in the second degree is punishable by imprisonment in the State Prison not less than ten years.

Petit treason abolished.

191. (§ 39.) The rules of the common law, distinguishing the killing of a master by his servant, and of a husband by his wife, as petit treason, are abolished, and these offenses are homicides, punishable in the manner prescribed by this Chapter.

NOTE.—Petit treason, according to the statute of 25 Edw. III, Chap. 2, might happen three ways: by a servant killing his master, a wife her husband, or an ecclesiastical person (either secular or regular) his superior, to whom he owed faith and obedience. Petit treason was but an aggravated degree of murder. The distinction between it and murder was abolished in England by statute of 9 Geo. IV, Chap. 31, Sec. 2. The punishment of petit treason in a man was to be drawn and quartered; in a woman to be drawn and burned.—4 Bl. Com., p. 204.

Manslaughter defined. Voluntary and involuntary manslaughter.

192. Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds:

1. Voluntary—upon a sudden quarrel or heat of passion.

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be formed upon a preëxisting reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation. There need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer; and if such is the case, the killing is murder of the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing."—See, also, *People vs. Bealoba*, 17 Cal., p. 389; *People vs. Foren*, 25 Cal., p. 361; *People vs. Pool*, 27 Cal., p. 572; *People vs. Nichol*, 34 Cal., p. 211; *People vs. Long*, 39 Cal., p. 694. So far as the degree is concerned no presumption arises from the mere fact of killing.—*People vs. Belencia*, 21 Cal., p. 544.

2. Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.

NOTE.—This section embodies the material portions of Sections 22, 23, 24, and 25 of the Crimes and Punishment Act of 1850. (Stats. 1850, p. 229.)

MALICE.—The distinguishing feature between murder and manslaughter is the presence or absence of malice. If malice enter into the unlawful act by which death is caused, the crime is murder; but if malice be wanting, it is but manslaughter.—2 Wharton's Cr. Law, Sec. 932. No words of reproach, however grievous, are sufficient provocation to reduce the offense of an intentional homicide from murder to manslaughter.—People vs. Butler, 8 Cal., p. 435.

Subd. 1.—Wharton defines voluntary manslaughter to be "the unlawful killing of another, without malice, on sudden quarrel or in heat of passion."—2 Wharton Cr. Law, p. 932. If, upon a sudden quarrel, two persons fight, and one of them kills the other, this is voluntary manslaughter; and so, if they upon such occasion go out and fight, for this is one continued act of passion. So, also, if a man be greatly provoked by any gross indignity and immediately kills his aggressor, it is voluntary manslaughter; it is not excusable homicide, because it is not in self-defense; nor is it murder, for malice is wanting.—4 Bl. Com., p. 191; 1 Hawk. P. C., Chap. 30, Sec. 3; 1 Hale P. C., p. 449; 2 Wharton's Cr. Law, Sec. 932; Wharton on Homicide, pp. 35-417; Stokes vs. State, 18 Geo., p. 17; State vs. Norris, 1 Hay., p. 429. In cases of mutual combat, in order to reduce the offense to manslaughter, it must appear that the contest was waged on equal terms and no undue advantage was sought or taken by the defendant.—People vs. Sanchez, 24 Cal., p. 17.

Subd. 2.—"Involuntary manslaughter is where a man doing an unlawful act, not amounting to a felony, by accident kills another."—2 Wharton's Cr. Law, Sec. 933; Com. vs. Thompson, 6 Mass., p. 134; Studstill vs. State, 7 Geo., p. 2. Or where a person does an act, lawful in itself, but in an unlawful manner, and death ensues from the act.

193. (§ 26.) Manslaughter is punishable by imprisonment in the State Prison not exceeding ten years.

Punish-
ment of
man-
slaughter.

Deceased
must die
within a
year and a
day.

194. (§ 27.) To make the killing either murder or manslaughter, it is requisite that the party die within a year and a day after the stroke received or the cause of death administered; in the computation of which the whole of the day on which the act was done shall be reckoned the first.

NOTE.—This section affirms the common law rule.—
2 Bishop Cr. Law, Sec. 655; State vs. Orrell, 1 Dev.,
p. 139. "Fractions of a day are not regarded, consequently it makes no difference in the computation whether the stroke or death is in the morning or afternoon."—Id.

Excusable
homicide.

195. Homicide is excusable in the following cases:

1. When committed by accident and misfortune, in lawfully correcting a child or servant, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.

2. When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner.

NOTE.—4 Bl. Com., p. 182; 2 Bishop's Cr. Law, Sec. 592; 2 Wharton's Cr. Law, Sec. 934.

Justifiable
homicide
by public
officers.

196. Homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance, either—

1. In obedience to any judgment of a competent Court; or,

2. When necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or,

3. When necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest.

NOTE.—*Subd. 1.*—4 Bl. Com., p. 1781; 2 Wharton's Am. Law, Sec. 936; 2 Bishop's Cr. Law, Sec. 540; State vs. Smith, 32 Me., p. 369. But the execution must be in strict accordance with the judgment. If a person is condemned to be hanged and the Sheriff behead him this is murder.—1 Hale P. C., p. 433. And the same is true if any person not authorized executes the sentence of death.—2 Bishop's Cr. Law, Secs. 540, 584.

Subd. 2.—4 Bl. Com., p. 179; 2 Wharton's Cr. Law, Sec. 937; Wharton on Homicide, pp. 36, 211.

Subd. 3.—4 Bl. Com., p. 179; 1 Hale P. C., p. 494; 1 East. P. C., p. 298; see People vs. Pool, 27 Cal., p. 572.

197. Homicide is also justifiable when committed by any person in either of the following cases:

Justifiable
homicide
by other
persons.

1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or,

2. When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein; or,

3. When committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mortal combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed; or,

4. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for

any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.

NOTE.—The three preceding sections are based upon Sections 29, 31, 32, 33, 34, and 35 of the Crimes and Punishment Act of 1850.—Stats. 1850, p. 229. The Commission have modified the language, making it accord in many respects with that of the New York Penal Code, Sections 260, 261, and 262. The legal effect, however, has not been changed.

Subd. 1.—Where a known felony is attempted upon the person, any other person present may interpose to prevent the mischief, and if death ensue the party interposing will be justifiable.—Wharton on Homicide, p. 230; Com. vs. Daley, 4 Penn. L. J., p. 153; 1 East. P. C., p. 271; Com. vs. Riley, Thatcher's C. C., p. 471. But this subdivision goes farther and extends the right to interpose even to the taking of life in resisting an attempt to do great bodily injury to another. If A may kill B to prevent the commission of a great bodily injury upon himself, it is difficult to see why a bystander may not so act in protection of A.

Subd. 2.—Wharton on Homicide, pp. 230, 432.

Subd. 3.—4 Bl. Com., p. 184; U. S. vs. Vigol, 2 Dallas, p. 346; People vs. Doe, 1 Mann. (Mich.), p. 451; Oliver vs. State, 17 Ala., p. 573; People vs. McLeod, 1 Hill, p. 377; State vs. Morgan, 3 Iredell, p. 186. What the nature of the assault must be.—Wharton on Homicide, p. 212. How far and when retreat is necessary.—Id., p. 213. What certainty must exist as to felonious intent.—Id., p. 214.

Subd. 4.—Wharton on Homicide, p. 235; State vs. Anderson, 1 Hill, p. 327.

GENERALLY.—People vs. Arnold, 15 Cal., p. 476; People vs. Batchelder, 27 Cal., p. 69; People vs. Campbell, 30 Cal., p. 312; People vs. Pool, 27 Cal., p. 572; People vs. Scoggins, 37 Cal., p. 735.

197. (Subd. 2.) The killing of another is justifiable only when the entry into a habitation is being made in a violent, riotous, or tumultuous manner, for the purpose of offering violence to some person therein, or for the purpose of committing a felony by violence. People v. Walsh, 43 Cal. 449.

(Subd. 3.) If a gun be pointed at one in a threatening manner, under such circumstances as to induce a reasonable belief that it is loaded and will be discharged, and thereby produce death, or inflict a great bodily injury on the person threatened, he will be justified in using whatever force will be necessary to avert the apparent danger, though it may afterward appear that the gun was not loaded. People v. Anderson, 44 Cal. 65.

Bare fear
not to
justify
killing.

198. (§ 30.) A bare fear of the commission of any of the offenses mentioned in Subdivisions 2 and 3 of the preceding section, to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstance must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone.

198. What constitutes fear sufficient to justify killing. See generally. People v. Walsh, 43 Cal. 450.

NOTE.—Weakness of mind, fear, and excitement of defendant, produced by the violence of the deceased, will not justify the homicide.—People vs. Hurley, 8 Cal., p. 390; People vs. Lombard, 17 Cal., p. 316. In Shorter vs. People, 2 Comstock, p. 197, said Bronson, J., speaking for the Court:

“When one who is without fault himself is attacked by another in such a manner or under such circumstances as to furnish reasonable ground for apprehending a design to take away his life, or do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, I think he may safely act upon appearances and kill the assailant, if that be necessary to avoid the apprehended danger; and the killing will be justifiable, although it may afterwards turn out that the appearances were false, and there was *in fact* neither design to do him serious injury nor danger that it would be done. He must decide at his peril upon the force of the circumstances in which he is placed, for that is a matter which will be subject to judicial review. But he will not act at the peril of making that guilt, if appearances prove false, which would be innocence had they proved true. I cannot better illustrate my meaning than by taking the case put by Judge (afterwards Chief Justice) Parker, of Massachusetts, on the trial of Thomas O. Selfridge: ‘A, in the peaceable pursuit of his affairs, sees B walking rapidly towards him with an outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough in the same attitude A, who has a club in his hand, strikes B over the head before or at the instant the pistol is discharged, and of the wound B dies. It turns out that the pistol was loaded with powder only, and that the real design of B was only to terrify A.’ Upon this case the Judge inquires, ‘will any reasonable man say that A is more criminal than he would have been if there had been a bullet in the pistol? Those who hold such doctrine must require that a man so attacked must, before he strikes the assailant, stop and ascertain how the pistol was loaded—a doctrine which would entirely take away the right of self-defence. And when it is considered that the jury who try the cause, and not the party killing, are to judge of the reasonable grounds of his apprehension, no danger can be supposed to flow from this principle.’ The Judge had before

instructed the jury that 'when, from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing of the assailant will be excusable homicide, although it should afterwards appear that no felony was intended.'—Selfridge's Trial, p. 160; 1 Russ. on Crime, p. 699, ed. of '24; p. 485, note, ed. of '36. To this doctrine I fully subscribe. A different rule would lay too heavy a burden upon poor humanity.

"I have stated the case of Selfridge the more fully because it is not only an authority in point but it is one which the revisers professed to follow in framing our statute touching this question.

"I shall not stop to consider the common law distinctions between justifiable and excusable homicide, because our statute has placed killing in self defence under the head of justifiable homicide.—2 R. S., p. 660, Sec. 3.

"The Massachusetts case lays down no new doctrine. The same principle was acted on in Levett's Case, recited by Jones, J., in Cook's Case, Cro. Car., p. 538, to the following effect: Levett was in bed with his wife, and asleep, in the night, when the servant ran to them, in fear, and told them that thieves were breaking open the house. He arose suddenly, and taking a drawn rapier in his hand, went down and was searching the entry for the thieves, when his wife espying some one whom she knew not in the buttry, cried out to her husband, in great fear, 'here they be that would undo us.' Levett thereupon hastily entered the buttry in the dark, not knowing who was there, and thrusting with his rapier before him, killed Frances Freeman, who was lawfully in the house, and wholly without fault. On these facts, found by special verdict, the Court held that it was not even a case of manslaughter, and the defendant was wholly acquitted. Now here the defendant acted upon information and appearances which were wholly false; and yet as he had reasonable ground for believing them true he was held guiltless. Foster, (Crown Law, p. 299) says of this case, 'possibly it might have been better ruled manslaughter at common law, due circumspection not having been used.' I do not understand him as questioning the principle of the decision, but as only expressing the doubt whether the principle was properly applied. He calls it nothing more than a case of manslaughter, when, if a man may not act upon appearances, it was a plain case of murder. So far as I have observed, no other writer upon criminal law has questioned, in any degree, the

decision in Levett's case; and most of them have fully approved it. East, in his *Pleas of the Crown* (Vol. 1, pp. 274, 275), has done so. Hale (1 P. C., pp. 42, 474) mentions it among cases where ignorance of the fact will excuse from all blame. Hawkins (1 P. C., p. 84, Curwood's ed.) says the killing had not the appearance of a fault. Russell (on Crimes, Vol. 1, p. 550, ed. of 1836) approves the decision, which he introduces with the remark that 'important considerations will arise in cases of this kind [he was speaking of homicide in defense of one's person, habitation or property] as to the grounds which the party killing had for supposing that the person slain had a felonious design against him; more especially where it afterwards appears that no such design existed.' Roscoe (Crim. Ev., p. 639) says, 'it is not essential that an actual felony should be about to be committed in order to justify the killing. If the circumstances are such as that, after all reasonable caution, the party suspects that the felony is about to be immediately committed, he will be justified.' And he then gives Levett's case as an example.

"The case of Sir Wm. Hawksworth, who, through his own fault, was shot by the keeper of his park, who took him for a stranger who had come to destroy the deer, went upon the same principle.—1 Hale's P. C., p. 40; 1 East P. C., p. 275; 1 Russ. on Cr., p. 549. Other cases are put in the books where the killing will be justified by appearances, though they afterwards prove false. A General, to try the vigilance or courage of his sentinel, comes upon the sentinel in the night in the posture of an enemy, and is killed. There the ignorance of the sentinel that it was his General, and not an enemy, will justify the killing.—1 Hale's P. C., p. 40; 1 East P. C., p. 275; 1 Russ., p. 540. The case mentioned by Lord Hale, which was before him at Peterborough, where a servant killed his master, supposing he was shooting at deer in the corn, in obedience to his master's orders, belongs to the same class.—1 Hale's P. C., pp. 40, 476. 1 Russ., p. 540. In Rampton's Case, Kelyng Rep., p. 41, the defendant killed his wife with a pistol which he had found in the street, after ascertaining, as he supposed, by a trial with the ramrod, that it was not loaded, though in fact it was charged with two bullets. This was adjudged to be manslaughter, and not merely misadventure. Foster (Crown Law, pp. 263, 264) calls this a hard case, and thinks the man should have been wholly acquitted, on the ground that he exercised due caution—the utmost caution not being necessary in such cases. But if the decision was right, as I am in-

clined to think it was, for the want of proper caution, still the case goes on the ground that the degree of guilt may be affected by appearances which afterwards prove false; for if he had not tried the pistol it would have been murder. Foster (p. 265) mentions a case which was tried before him, where the prisoner had shot his wife with a gun which he supposed was not loaded. The Judge, being of opinion that the prisoner had reasonable ground to believe that the gun was not loaded, directed the jury that if they were of the same opinion they should acquit the prisoner; and he was acquitted. In Meade's Case, 1 Lewin's Cr. Cas., p. 184, the prisoner had killed with a pistol one of a great number of persons who came about his house in the night time, singing songs of menace and using violent language. Holroyd, J., told the jury that if there was nothing but the song, and no *appearance* of violence—if they believed there was no *reasonable ground* for apprehending danger, the killing was murder. And in The People vs. Rector, 19 Wend., p. 569, Cowen, J., said, alarm on the part of the prisoner, *on apparent though unreal* grounds, was pertinent to the issue. In The U. S. vs. Wiltberger, 3 Wash. C. C., pp. 515, 521, the Judge told the jury that, for the purpose of justifying the killing, the intent of the deceased to commit a felony must be *apparent*, which would be sufficient, although it should afterwards turn out that the real intention was less criminal, or even innocent. He afterwards added that the danger must be imminent—meaning, undoubtedly, that it must wear that appearance. The State vs. Wells, 1 Cox, N. J. Rep., p. 424, is entirely consistent with this doctrine. The Supreme Court of Tennessee has gone still further; and held that one who kills another, believing himself in danger of great bodily harm, will be justified, although he acted from cowardice, and without any sufficient ground, in the appearance, for the killing.—Grainger vs. State, 5 Yerger, p. 459. This was, I think, going too far. It is not enough that the party believed himself in danger, unless the facts and circumstances were such that the jury can say he had reasonable grounds for his belief.

“We have been referred to two cases where it was said, in substance, that the killing must be necessary.—Regina vs. Smith, 8 Car. & Pay., p. 160, and Regina vs. Bull, 9 id., p. 22. And other authorities to the same effect might have been cited. The life of a human being must not be taken upon slight grounds; there must be a necessity, either actual or apparent,

for the killing, or it cannot be justified. That, I think, is all that was meant by such remarks as have been mentioned. The unqualified language that the killing must be necessary has, I think, never been used when attention was directed to the question whether the accused might not safely act upon the facts and circumstances as they were presented at the time. I have met with no authority for saying that a homicide which would be justifiable had appearances proved true will be criminal when they prove false.

“But it is said that our statute has changed the rule of the common law on this subject, and that there must *in fact* be danger of great bodily harm or the killing cannot be justified. We know that such a change was not intended by the revisers, for they said in their notes that the provision was ‘according to the views of most of the writers on the subject, and the express decisions in Massachusetts and New Jersey.’ Those writers and decisions have already been noticed. As I read the statute, it affirms the rule of the common law. The words are, homicide in self defense is justifiable ‘when there shall be *a reasonable ground to apprehend* a design to commit a felony, or to do some great personal injury, and there shall be *imminent danger* of such design being accomplished.’—2 R. S., p. 660, Sec. 3, Subd. 2. The words ‘imminent danger,’ in the last branch of the clause, do not mean, as the argument for the prisoner assumes, that there must be an impending evil which is ready to fall; but only that there is a threatened evil, or one which appears as if it were ready to fall. There must be reasonable ground to apprehend a wicked design, and apparent danger that such design will be accomplished. It is enough, by the express words of the statute, that there is reasonable ground to apprehend a wicked design; and it is absurd to suppose that such a provision was immediately followed by another, that the danger of the apprehended design being accomplished must be actual, and not merely apparent. Such a construction would make the last part of the clause nullify the first; for if there must be actual danger that the design will be accomplished there must of necessity be an actual design to be accomplished.”

In *Grainger vs. The State*, 5 Yerger, p. 459, “the plaintiff in error was indicted in the Circuit Court of Henry County for the murder of — Broach, was tried, convicted, and moved for a new trial on several grounds. His motion was overruled, and sentence of death being passed upon him, he appealed in error to

this Court. The bill of exceptions shows the following facts, viz: On the 9th of July, 1829, Broach, the deceased, and Henson, were at Norwood's. Late in the evening Grainger came there and had his gun with him, which he generally carried, being a hunter. Broach and Henson were drinking cordial; Broach asked Grainger to drink with them; he replied that he did not drink cordial, but would drink whisky, and called for an half pint. Broach and Henson drank three half pints of cordial, and Grainger the half pint of whisky. All this time Broach and Grainger seemed friendly. Grainger was setting off for home; Henson asked him to wait for Broach; Grainger replied he knew Broach, that he would not go till he chose, and declined waiting for him. Henson went into the house and requested Broach to go; he then returned, and he and Grainger set off together, leaving Broach at Norwood's. Henson was on foot and Grainger riding. The latter invited Henson to get up behind him, which he did. About three eighths of a mile from Norwood's Broach overtook them, riding at a fast gate. He immediately commenced a quarrel with Grainger, by charging him with having spoken disrespectfully of him, and that he had held his negroes till the children of Grainger had whipped them. Grainger denied the charges, said he had not said anything about Broach, or held his negroes, as charged. Broach said, 'You are a liar, and if you deny it, I'll knock you off your horse.' Grainger still denied the charges. Broach rode up to him and struck him a violent blow on the breast. Grainger turned his horse suddenly away and rode a short distance apart from Broach, saying to witness, Henson, 'Take notice, I will make him pay for it.' The quarrel and ill language continued for about five eighths of a mile further, when they came to the corner of Rainey's fence, about forty yards from the house. Grainger threw his leg over his horse's neck and lighted on the ground, turned his horse to the fence, when Henson also alighted. At this moment Broach also alighted from his horse; Grainger threw his bridle over a rail, crossed the fence and walked towards the house, saying to Henson, 'You are in cahoot with Broach.' Henson said he had nothing against Grainger, who replied, 'I don't know that you have.' The house stood some ten yards inside of the line of fence, and forty yards in advance of where the parties alighted. Grainger walked inside, Broach and Henson outside. Outside the house there was a gap. Rainey, his wife, and two other women, were awakened from their sleep by the

violent quarreling. The first Rainey heard was the defendant crying, 'Rainey ! Rainey !' like one afraid and calling for help. The women got up and looked through a crack of the cabin; Grainger was standing two or three yards from the wall, Broach advancing upon him, having passed through the gap. Grainger said to him, 'I will shoot you if you follow me.' Broach replied, 'I am not afraid of your shooting; damn you, you would not shoot a cat; shoot !' Defendant said, 'I have a mind to shoot you.' Broach said, 'Here I stand, shoot !' Defendant fired and killed Broach. Broach was eighteen or twenty feet from Grainger when the gun fired. The witness, Elizabeth Forbes, could not see Broach when he was shot, because he was in the shadow of a tree; but Henson, who was sitting on the fence in the gap, a few yards off, could see Broach, who advanced directly on Grainger without stopping, and whilst advancing, was shot. Henson also proves that Grainger said, when he first crossed the fence, 'If Broach don't let me alone I will shoot him.' Broach said, 'You carry your gun to defend yourself.' Grainger replied, 'I do not.' "

Catron, J., delivered the opinion of the Court:

"The bill of exceptions shows that much stress, on the trial, was laid upon the blow given by Broach to Grainger, to reduce the killing to manslaughter; that Grainger's passions had not cooled. He never had any passion; he was much alarmed, and with good cause. A man was on his horse behind him; he could not get away. Henson proves he did not pretend to prevent Broach from whipping Grainger, who believed, and most probably rightfully, that Henson was in 'cahoot' with Broach. It was Henson's duty to have protected Grainger, or got off from behind him, and left him free to escape from Broach. Grainger used all the means in his power to escape from an overbearing bully. He was shuddering with fear, and his last hope of protection was defeated when Rainey's door continued closed against him, and Rainey did not come to his relief. He shot only to protect his person from threatened violence, and that great. It was certain. Henson sat quietly on the fence; the women and Rainey did not open the door; they were, no doubt, afraid of Broach, who displayed the traits of a reckless bully, and would have attacked Grainger the moment he reached him, as well in the house as out of it. It behooved Rainey not to permit the attack in a cabin, amongst women and children, in the dark. He did right not to open the door. From Henson no assistance could be hoped; the w

saw him quietly sitting on the fence, which, when Broach crossed, he helped himself over by putting his hand on the shoulder of Henson. These are the facts as presented by the record before us. Was there malice prepense in this case of homicide, so as to exclude the benefit of clergy within the 23d Henry VIII, Chap. 1? Did Grainger display a cold, deliberate, and wicked conduct?—a heart lost to all social order and fatally bent on mischief? It cannot be believed. He behaved like a timid, cowardly man, was much alarmed, in imminent danger of a violent and instant assault and battery, and was cut off from the chances of probable assistance. That the act was the result of fear hardly admits of doubt. It is equally certain to our minds that Broach only designed to commit a trespass and battery upon the body of Grainger, without intending to kill him. If the jury had believed that Grainger was in danger of great bodily harm from Broach, or thought himself so, then the killing would have been in self-defense. But if he thought Broach intended to commit a battery upon him, less violent, to prevent which he killed Broach, it was manslaughter. 1 Hawk. P. C., Chap. 28, Sec. 23; 1 East C. L., p. 272. The judgment will be reversed, and the cause remanded for another trial."

Justifiable
and
excusable
homicide
not punish-
able.

199. (§ 36.) The homicide appearing to be justifiable or excusable, the person indicted must, upon his trial, be fully acquitted and discharged.

NOTE.—Sections 32 and 41, of the Crimes and Punishment Act of 1850, properly belong in the Criminal Practice Act, and the Commission have so placed them.

CHAPTER II.

MAYHEM.

SECTION 203. Mayhem defined.

204. Mayhem, how punishable.

Mayhem
defined.

203. (§ 46.) Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or

~~who cuts out or disables the tongue, puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem.~~ ^{or}

NOTE.—The Code has modified the language of the Act of 1856 (Stats. 1856, p. 219), defining mayhem, but the section has not been changed in substance. Mayhem, at common law, was such a bodily injury as would render a man less able in fighting to defend himself or annoy his adversary; but it was not mayhem if the injury only disfigured; upon this distinction, the cutting off, disabling, or weakening a man's hand, or finger, or striking out an eye, or fore tooth, or castrating him, are maims; but the cutting off his ear, nose, etc., are not such at common law.—2 Wharton's Am. Cr. Law, Sec. 1171; 3 Bl. Com., p. 121; 4 id., p. 205; State vs. Danforth, 3 Conn., p. 112.

204. (§ 46.) Mayhem is punishable by imprisonment in the State Prison not exceeding fourteen years. Mayhem,
how pun-
ishable.

CHAPTER III.

KIDNAPPING.

SECTION 207. Kidnapping defined.

208. Punishment of kidnapping.

207. (§§ 53, 54, 55.) Every person who forcibly steals, takes, or arrests any person in this State, and carries him into another country, State, or county, or who forcibly takes or arrests any person, with a design to take him out of this State, without having established a claim according to the laws of the United States or of this State, or who hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any person to go out of this State, or to be taken or removed therefrom, for the purpose and with the intent to sell such person into slavery or involuntary servitude, or otherwise to employ him for his own use, or to the use of another, without the free Kidnap-
ping
defined.

will and consent of such persuaded person, is guilty of kidnapping.

NOTE.—2 Wharton Cr. Law, p. 1211. The term “kidnapping” is, by earlier writers, used to denote the abduction of children only; and this seems its etymological meaning.—See Philips’ World of Words; Webst. Dict.; Johns. Dict. Many accurate authorities employ it without respect to the age of the subject; but confine it to an abduction committed with intent to export the person injured out from his own home, State, or country, to another.—See Bell’s Dict. Law of Scot.; Bouvier’s Law Dict.; Jacobs’ Law Dict. Thus, the Revised Statutes of Illinois, Vol. 1, p. 366, Secs. 54, 55, make false imprisonment to consist in a confinement or detention without legal authority, and confine kidnapping to the offense of abducting and sending to another country. In *Hadden vs. The People*, 25 N. Y., p. 372, it has been lately held that procuring the intoxication of a sailor, with the design of getting him on shipboard, without his consent, and taking him on board in that condition, is kidnapping under the Revised Statutes; and that it is immaterial whether the offender did the acts, or any of them, in person, or caused them to be done. Where the intent and expectation is, in such a case, that the seaman will be carried out of this State, the offense is complete, although the ship be not, in fact, destined to leave the State.—See *People vs. Chee Quong*, 15 Cal., p. 332.

Punish-
ment of
kidnap-
ping.

208. (§ 54.) Kidnapping is punishable by imprisonment in the State Prison not less than one nor more than ten years.

CHAPTER IV.

ROBBERY.

SECTION 211. Robbery defined.

212. What fear may be an element in robbery.

213. Punishment of robbery.

Robbery
defined.

211. (§ 59.) Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

NOTE.—Robbery is the felonious and forcible taking of the property of another from his person, or in his presence against his will, by violence, or by putting him in fear.—4 Bl. Com., p. 243; 2 Wharton's Am. Law, Sec. 1695. It is not necessary that the property should belong to the person from whose possession it was forcibly taken. It is requisite, however, that it should belong to some other person than the defendant, for the owner of property is not guilty of robbery in taking it from the possession of the possessor.—People vs. Vice, 21 Cal., p. 344. The taking must be from the person, or in the presence of the party robbed.—U. S. vs. Jones, 3 Wash. C. C. R., p. 209; R. vs. Grey, 2 East P. C., p. 708; Com. vs. Snelling, 4 Binney, p. 379; R. vs. Hamilton, 8 C. & P., p. 49. And against his will.—Long vs. State, 12 Geo., p. 293. If "force" is used "fear" is not an essential ingredient of the crime.—McDaniel vs. State, 8 S. & M., p. 401; Com. vs. Snelling, 4 Binney, p. 379; State vs. McCune, 5 R. I., p. 60; 2 Wharton's Cr. Law, Sec. 1698. Instead of "felonious," the N. Y. Code uses the word "wrongful." There the definition, in Sec. 280, is: "Robbery is a wrongful taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." In this definition the word "wrongfully" is substituted for "feloniously." Three elements are necessary to constitute the offense of robbery, as it is *generally understood*: 1. A taking of property from the person or presence of its possessor; 2. A wrongful intent to appropriate it; 3. The use of violence or fear to accomplish the purpose. The first and second of these elements, the third being wanting, constitute simple larceny; the first and third, without the second, amount at most to a trespass; the second and third, without the first, constitute an attempt to rob.

212. The fear mentioned in the last section may be either:

1. The fear of an unlawful injury to the person or property of the person robbed, or of any relative of his or member of his family; or,

2. The fear of an immediate and unlawful injury to the person or property of any one in the company of the person robbed at the time of the robbery.

What fear may be an element in robbery.

NOTE.—*Subd. 1.*—2 Wharton's Cr. Law, p. 1699; Long vs. State, 12 Ga., p. 293; R. vs. Winkworth, 4 C. & P., p. 444.

Punish-
ment of
robbery.

213. (§ 59.) Robbery is punishable by imprisonment in the State Prison not less than one year.

NOTE.—Stats. 1856, p. 220, Sec. 6.

CHAPTER V.

ATTEMPTS TO KILL.

SECTION 216. Administering poison.

217. Assault with intent to commit murder.

Adminis-
tering
poison.

216. (§ 45.) Every person who, with intent to kill, administers, or causes or procures to be administered, to another, any poison or other noxious or destructive substance or liquid, but by which death is not caused, is punishable by imprisonment in the State Prison not less than ten years.

NOTE.—Stats. 1861, p. 588, Sec. 1.

Assault
with intent
to commit
murder.

217. (§ 50.) Every person who assaults another with intent to commit murder, is punishable by imprisonment in the State Prison not less than one nor more than fourteen years.

NOTE.—Stats. 1855, p. 105, Sec. 2; People vs. Keefer, 18 Cal., p. 636; People vs. Nugent, 4 Cal., p. 341.

CHAPTER VI.

ASSAULTS WITH INTENT TO COMMIT FELONY, OTHER THAN ASSAULTS WITH INTENT TO MURDER.

SECTION 220. Assaults with intent to commit rape.

221. Other assaults.

222. Administering stupefying drugs.

220. (§ 50.) Every person who assaults another with intent to commit rape, the infamous crime against nature, mayhem, robbery, or grand larceny, is punishable by imprisonment in the State Prison not less than one nor more than fourteen years.

Assault with intent to commit rape.

NOTE.—Stats. 1855, p. 105, Sec. 2.

221. Every person who is guilty of an assault, with intent to commit any felony, except an assault with intent to commit murder, the punishment for which assault is not prescribed by the preceding section, is punishable by imprisonment in the State Prison not exceeding five years, or in a County Jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both.

Other assaults.

222. Every person guilty of administering to another any chloroform, ether, laudanum, or other narcotic, anæsthetic, or intoxicating agent, with intent thereby to enable or assist himself or any other person to commit a felony, is guilty of felony.

Administering stupefying drugs.

NOTE.—Consol. St. of Canada, p. 955, Sec. 13.

CHAPTER VII.

DUELS AND CHALLENGES.

SECTION 225. Duel defined.

226. Punishment for fighting a duel, when death ensues.

227. Punishment for fighting a duel, although death does not ensue.

228. Persons fighting duels, etc., disqualified from holding office, etc.

229. Posting for not fighting.

230. Duties of officers to prevent duels.

231. Leaving the State with intent to evade laws against duelling.

232. Witness' privilege.

220. A person who assaults another with intent to commit a rape, but who does not act or aid, or abet its commission, is not guilty of an attempt to commit a rape. People v. Woodward, 45 Cal. 293.

Duel
defined.

225. A duel is any combat with deadly weapons, fought between two or more persons, by previous agreement or upon a previous quarrel.

Punish-
ment for
fighting a
duel, when
death
ensues.

226. Every person guilty of fighting any duel, from which death ensues within a year and a day, is punishable by imprisonment in the State Prison not less than one nor more than seven years.

NOTE.—Fighting a duel with fatal results held not to be murder within our statutes, but a special offense under the Act of 1855.—Terry vs. Bartlett, 14 Cal., p. 651.

Punish-
ment for
fighting
a duel,
although
death does
not ensue.

227. Every person who fights a duel, or who sends or accepts a challenge to fight a duel, is punishable by imprisonment in the State Prison or in a County Jail not exceeding one year.

Persons
fighting
duels, etc.
disquali-
fied from
holding
office, etc

228. Every person who fights a duel, or who sends or accepts a challenge to fight a duel, shall, in addition to the punishment prescribed in the last section, be forever disqualified from holding any office, or from exercising the elective franchise in this State, and shall be declared so disqualified in the judgment upon conviction.

Posting for
not fighting

229. (§ 43.) Every person who posts or publishes another for not fighting a duel, or for not sending or accepting a challenge to fight a duel, or who uses any reproachful or contemptuous language, verbal, written, or printed, to or concerning another, for not sending or accepting a challenge to fight a duel, or with intent to provoke a duel, is guilty of a misdemeanor.

Duties of
officers to
prevent
duels.

230. Every Judge, Justice of the Peace, Sheriff, or other officer bound to preserve the public peace, who has knowledge of the intention on the part of any persons to fight a duel, and who does not exert his official authority to arrest the party and prevent the duel, is punishable by fine not exceeding one thousand dollars.

231. Every person who leaves this State with intent to evade any of the provisions of this Chapter, and to commit any act out of this State such as is prohibited by this Chapter, and who does any act, although out of this State, which would be punishable by such provisions if committed within this State, is punishable in the same manner as he would have been in case such act had been committed within this State.

Leaving
the State
with intent
to evade
laws
against
dueling.

232. No person shall be excused from testifying or answering any question upon any investigation or trial for a violation of either of the provisions of this Chapter, upon the ground that his testimony might tend to convict him of a crime. But no evidence given upon any examination of a person so testifying shall be received against him in any criminal prosecution or proceeding.

Witness'
privilege.

NOTE.—The sections relating to duels are founded upon the provisions of an Act of 1855 (Stats. 1855, p. 152, Sec. 1), and of Secs. 43 and 44 of the Crimes and Punishment Act of 1850, and Secs. 293, 294, 300, 301, and 303 of the New York Penal Code. No provision has ever been made for carrying into effect the constitutional provisions on the subject, and although fighting by previous appointment, without the use of deadly weapons, was by the Act of 1850 (Stats. 1850, p. 229) made a felony, yet there was no punishment affixed to the offense of dueling, unless death ensued. The Code supplies these omissions. Secs. 2 and 3 of the Act of 1855, giving remedies by action for injuries, etc., arising from dueling, are inserted in the Civil Code.—See Civil Code, Secs. 3347, 3348.

CHAPTER VIII.

FALSE IMPRISONMENT.

SECTION 236. False imprisonment defined.

237. False imprisonment, how punished.

False imprisonment defined.

236. (§ 52.) False imprisonment is the unlawful violation of the personal liberty of another.

False imprisonment, how punished.

237. (§ 52.) False imprisonment is punishable by fine not exceeding five thousand dollars, or by imprisonment in the County Jail not more than one year, or both.

NOTE.—False imprisonment is not a felony.—People vs. Ebner, 23 Cal., p. 459. 157

CHAPTER IX.

ASSAULT AND BATTERY.

SECTION 240. Assault defined.

241. Assault, how punished.

242. Battery defined.

243. Battery, how punished.

244. Assaults with caustic chemicals.

245. Assaults with deadly weapons.

Assault defined.

240. (§ 49.) An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.

NOTE.—Stats. 1856, p. 219, Sec. 5. This is substantially the common law definition.—People vs. Yslas, 27 Cal., p. 630; 2 Bishop's Cr. Law, Sec. 32; 3 Black. Com., p. 120.

INTENT TO STRIKE.—An assault has also been said to be an intentional attempt, by violence, to do an injury to the person of another. It must be *intentional*. If there is no present purpose to do an injury, there is no assault. There must also be an *attempt*. A purpose not accompanied by an effort to carry into immediate execution falls short of an assault. Thus no words can amount to an assault. But rushing towards another with menacing gestures, and with a *purpose to strike*, is an assault, though the accused is prevented from striking before he comes near enough to do so.—State vs. Davis, 1 Ired. N. C., p. 121; People vs. Yslas, 27 Cal., p. 630. But mere threatening gestures unaccompanied by such a purpose, although sufficient to cause a man of ordinary firmness to believe he was about to be struck, do not constitute an assault. Thus,

240. An assault made without the use of a deadly weapon, with intent to do mere bodily harm, and not to do murder, is a misdemeanor—nothing more. People v. Marat, 45 Cal. 281.

when the defendant shook his whip at the prosecutor, saying, at the same time: "If you were not an old man I would knock you down." *Held*, no assault, unless the jury should be satisfied that there was a present purpose to strike.—*State vs. Crow*, 1 Ired. N. C., p. 375. To the same effect is *Commonwealth vs. Eyre*, 1 Serg. & R., p. 347. So, where an Ambassador exhibited a painting in the window of his house which gave offense to the crowd without, and defendant, among the crowd, fired a pistol at the painting at the very time when the Ambassador and his servants were in the window to remove it, but did not intend to hurt any of them, and in fact did not. *Held*, that there being no intent to injure the person there could be no conviction for an assault.—*U. S. vs. Hand*, 2 Wash. C. C., p. 435; *People vs. McMakin*, 8 Cal., p. 547. But threatening another with a weapon, as a means of coercing him to yield to a demand, intending to strike if he refuses, but not to strike if he complies, is an assault, although the other party negotiates and no blow is finally given. It makes no difference that the purpose to commit violence is not absolute but only conditional.—*State vs. Morgan*, 3 Ired. N. C., p. 186. And, in general, it is an assault to present a pistol which purports to be loaded at another person, so near as would endanger life if it were fired, although the pistol is not, in fact, loaded.—*State vs. Smith*, 2 Humph., p. 457; *Rex vs. Parfait*, Lach., p. 23; *East. P. C.*, p. 416; *Rex vs. Thomas*, Lach., p. 272; *East. P. C.*, p. 417; also, *Morgan vs. State*, 33 Ala., p. 413, where it is held that the presenting a pistol loaded and cocked, although with the finger on the trigger, and in an angry manner, does not of itself raise a presumption of an intent to murder, but is a common assault.

CONSENT.—In general, if the party suffering the violence has consented to it, there is no assault. Thus, although a child of tender years cannot legally consent to a rape upon her, yet she may consent to an attempt to commit it; and such an attempt, if committed with her consent, is not an assault.—*Rey vs. Cockburn*, 3 Cox Cr. Cas., p. 543; *Rey vs. Read*, 2 Carr. & K., p. 957; 3 Cox Cr. Cas., p. 266; 1 Den. C. C., p. 377; *Rex vs. Wehegan*, 7 Cox Cr. Cas., p. 145. But there must be actual consent. Mere omission to resist is not enough.—*Reg. vs. McGavaran*, 6 Cox Cr. Cas., p. 64. And where a medical man to whom a girl of fourteen years of age was sent for professional advice had

criminal connection with her, she making no resistance, from a bona fide belief that the defendant was treating her medically, as he represented he was doing. *Held*, he was properly convicted of an assault, and might have been of rape.—Reg. vs. Case, 4 Cox Cr. Cas., p. 220; 1 Den. C. C., p. 580.

Assault, how punished.

241. (§ 49.) An assault is punishable by fine not exceeding five hundred dollars, or by imprisonment in the County Jail not exceeding three months.

241. Construed, *Petty v. County Court of San Joaquin County*, 45 Cal. 246.

Battery defined

242. (§ 51.) A battery is any willful and unlawful use of force or violence upon the person of another.

NOTE.—This section is a substitute for that portion of Section 51 ~~of~~ the Crimes and Punishment Act of 1850, which defined assault and battery as “the unlawful beating of another.” The extended definition given in the section above accords with leading authority upon the subject.—3 Black. Com., p. 120; 2 Bishop’s Cr. Law, Secs. 62, 63; 17 Ala., p. 540; 9 N. H., p. 491.

Battery how punished

Battery 243. "A battery, or an assault and battery, is punish-
how
punished able by fine not exceeding one thousand dollars, or by
 imprisonment in the County Jail not exceeding one
 year.

Assaults with caustic chemicals

244. Every person who willfully and maliciously places or throws, or causes to be placed or thrown, upon the person of another, any vitriol, corrosive acid, or caustic chemical of any nature, with the intent to injure the flesh or disfigure the body of such person, is punishable by imprisonment in the State Prison not less than one nor more than fourteen years.

NOTE.—Stats. of 1868, p. 194, Sec. 1.

(§ 50) Every person who, with intent to do harm, and without just cause or excuse, or with no considerable provocation appears, or when the circumstances show an abandoned and malignant heart, commits an assault upon the person of another with a deadly weapon, instrument, or other thing, is punishable by imprisonment in the State Prison not exceeding two years, or by fine not exceeding five hundred dollars, or by both.

exceeding two years, or by fine not exceeding five thousand dollars, or by both.

NOTE.—Founded on portion of Act of 1855.—Stats. 1855, p. 106, Sec. 2. Slight verbal alterations have been made, but no substantial change.—People vs. Vanard, 6 Cal., p. 502; 686.

CHAPTER X.

LIBEL.

SECTION 248. Libel defined.

249. Punishment of libel.

250. Malice presumed.

251. Truth may be given in evidence. Jury to determine law and fact.

252. Publication defined.

253. Liability of editors and publishers.

254. Publishing a true report of public official proceedings privileged.

255. Extent of privilege.

256. Other privileged communications.

257. Threatening to publish libel. Offer to prevent publication, with intent to extort money.

248. A libel is a malicious defamation, expressed either by writing, printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or publish the natural or alleged defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule.

Libel defined.

See Sec 252
hereof

NOTE.—4 Black. Com., p. 150; 2 Kent Com., p. 735.

249. (§ 120.) Every person who willfully, and with a malicious intent to injure another, publishes or procures to be published any libel, is punishable by fine not exceeding five thousand dollars, or imprisonment in the County Jail not exceeding one year.

Punishment of libel.

Malice
presumed.

250. An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown.

Truth may
be given in
evidence.

251. (§ 120.) In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it appears to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted. The jury have the right to determine the law and the fact.

Jury to
determine
law and
fact.

NOTE.—Constitution of California, Sec. 9, Article I. Justification in civil cases.—*Thrall vs. Smiley*, 6 Cal., p. 530.

Publica-
tion
defined.

252. To sustain a charge of publishing a libel, it is not needful that the words or things complained of should have been read or seen by another. It is enough that the accused knowingly parted with the immediate custody of the libel under circumstances which exposed it to be read or seen by any other person than himself.

NOTE.—*Giles vs. The State*, 6 Georgia, p. 276.

Liability of
editors and
publishers.

253. Each author, editor, and proprietor of any book, newspaper, or serial publication, is chargeable with the publication of any words contained in any part of such book, or number of such newspaper or serial.

NOTE.—*Rex vs. Gretch*, 1 Moo. & M., p. 433; *Commonwealth vs. Kneeland*, *Thatch. Cr. C.*, p. 846.

Publishing
a true
report
of public
official pro-
ceedings
privileged.

254. No reporter, editor, or proprietor of any newspaper is liable to any prosecution for a fair and true report of any judicial, legislative, or other public official proceedings, or of any statement, speech, argument, or debate in the course of the same, except upon proof of malice in making such report, which shall not be implied from the mere fact of publication.

NOTE.—In *Sanford vs. Bennett*, 24 N. Y., p. 20, the question was whether a speech made by a convict at the place of execution was a speech made in the course

of a judicial or public official proceeding, within the meaning of the statute, so that one publishing it was protected by the statute from a civil action for injurious words contained in it, concerning other persons. The Court decided the question in the negative. They held that the statute applies only to judicial and legislative proceedings, and to transactions resembling them, and not to an executive act to be performed by a single person and admitting of no deliberation; and it protects only the publication of speeches which form properly a part of the proceeding.

255. Libelous remarks or comments connected with matter privileged by the last section receive no privilege by reason of their being so connected. Extent of privilege.

256. A communication made to a person interested in the communication, by one who was also interested or who stood in such relation to the former as to afford a reasonable ground for supposing his motive innocent, is not presumed to be malicious, and is a privileged communication. Other privileged communications.

NOTE.—Eastwood vs. Holmes, 1 Fost. & F., p. 347; Turnbull vs. Bird, 2 id., p. 524.

257. Every person who threatens another to publish a libel concerning him, or any parent, husband, wife, or child of such person, or member of his family, and every person who offers to prevent the publication of any libel upon another person, with intent to extort any money or other valuable consideration from any person, is guilty of a misdemeanor. Threatening to publish libel.

Offer to prevent publication, with intent to extort money.

NOTE.—This section was intentionally confined to threats uttered directly to the person about to be libeled. The ground upon which the criminal remedy for libel is allowed is the tendency of a libel to provoke a breach of the peace. A threat to publish one uttered to third persons, and only reaching the injured party through indirect repetition, is no more calculated to create disturbance of the peace than other forms of slander, and should not be distinguished from slander in the remedy allowed. See, also, Stats. 6 and 7 Vict., Chap. 96, Sec. 3, as to offers to *prevent* publication of libel.

TITLE IX.

OF CRIMES AGAINST THE PERSON AND AGAINST PUBLIC DECENCY AND GOOD MORALS.

CHAPTER I. *Rape, abduction, carnal abuse of children, and seduction.*II. *Abandonment and neglect of children.*III. *Abortions.*IV. *Child stealing.*V. *Bigamy, incest, and the crime against nature.*VI. *Violating sepulture and the remains of the dead.*VII. *Crimes against religion and conscience, and other offenses against good morals.*VIII. *Indecent exposure, obscene exhibitions, books and prints, and bawdy and other disorderly houses.*IX. *Lotteries.*X. *Gaming.*XI. *Pawnbrokers.*XII. *Other injuries to persons.*

CHAPTER I.

RAPE, ABDUCTION, CARNAL ABUSE OF CHILDREN, AND SEDUCTION.

SECTION 261. Rape defined.

262. When physical ability must be proved.

263. Penetration sufficient.

264. Punishment of rape.

265. Abduction of women.

266. Seduction for purposes of prostitution.

267. Abduction.

Rape
defined.

261. (§ 47.) Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under either of the following circumstances:

1. Where the female is under the age of ten years. *Same.*
2. Where she is incapable, through lunacy or any other unsoundness of mind, whether temporary or permanent, of giving legal consent.
3. Where she resists, but her resistance is overcome by force or violence.
4. Where she is prevented from resisting by threats of immediate and great bodily harm, accompanied by apparent power of execution; or by any intoxicating, narcotic, or anæsthetic substance, administered by or with the privity of the accused.
5. Where she is, at the time, unconscious of the nature of the act, and this is known to the accused.
6. Where she submits, under a belief that the person committing the act is her husband, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce such belief.

NOTE.—This section is an extension of the generally received definition of rape. East defines this offense to be “the unlawful carnal knowledge of a woman by force and against her will.”—1 East P. C., p. 434. Blackstone defines it in the same language, omitting the word “unlawful.”—4 Blackst. Comm., p. 210. And this is believed to be substantially the definition given by the leading writers on criminal law, except that some of the later decisions indicate a disposition to substitute the idea “without her consent,” for “against her will.”—Reg. vs. Camplin, 1 Cox Cr. Cas., p. 220; 1 Den. C. C., p. 89; 1 Carr. & K., p. 746; Reg. vs. Sweenie, 8 Cox Cr. Cas., p. 223; 3 Irvine, p. 159. The Code presents a definition which includes the various instances which have been adjudged to constitute the offense, with some others which have been held not to fall within the limited definition of the common law authorities, but to which the same penalties ought to be extended.

Subd. 1.—This provision embodies the well settled rule of the existing law; that a girl under ten years of age is incapable of giving any consent to an act of intercourse which can reduce it below the grade of rape.—Stephen vs. State, 11 Ga., p. 225; State vs. Farmer, 4 Ired., p. 224; 4 Blackst. Comm., p. 212.

Subd. 2.—It is probable that an act of intercourse with a woman above the age of ten years, but mentally incapable of giving legal consent, would be held to be rape. In England it has been held that under the statute, 13 Edw. I, Chap. 34—which provides that if a man * * do ravish a woman * * when she did not consent, neither before nor after, he shall, etc.—Forcible intercourse with a female, incapable, through imbecility of mind, of giving legal consent, is rape; although she was above ten years of age, and offered no resistance.—Reg. vs. Fletcher, 8 Cox Cr. Cas., p. 131; 5 Jur. (N. S.), p. 179. See, also, in support of the same principle, Rex vs. Ryan, 2 Cox Cr. Cas., p. 115; State vs. Cron, 10 West. L. J., p. 501; McNamara's Case, Oakley, p. 521.

Subd. 3, and the first clause of Sec. 4, embrace the ordinary cases of the offense, and require no special remark. As to resistance overcome by force, see Charles vs. State, 6 Engl., p. 389; State vs. Jim, 1 Den., p. 142; Pollard vs. State, 2 Clarke, p. 567; Myatt vs. State, 2 Swan., p. 394; Lewis vs. State, 30 Ala., p. 54; State vs. Blake, 39 Me., p. 322; Barney vs. People, 22 Ill., p. 160. As to resistance overcome by fear, see Pleasant vs. State, 8 Engl., p. 360; Reg. vs. Hallett, 9 Carr. & P., p. 748; Reg. vs. Day, id., p. 722; Wright vs. State, 4 Humph., p. 194.

Subd. 4, second clause, is intended to cover cases where the female is rendered temporarily incapable of giving consent by means of liquor or drugs. In Reg. vs. Camplin, 1 Cox Cr. Cas., p. 220; 1 Den. C. C., p. 89; 1 Carr. & K., p. 746, the jury found that the prisoner gave liquor to the female for the purpose of exciting her passions and inducing her consent; it had, however, the effect of rendering her drunk and insensible; in which condition he violated her. This was held to be rape; on the ground that the connection was accomplished without the consent and against the will of the female, which was all that was necessary to constitute the offense. Actual resistance on her part was not necessary to be shown. A number of similar instances of the commission of the offense are referred to in Wharton & St. Med. Jur., Secs. 441-443. This clause is not limited to cases in which the stupefying drug is administered with intent to facilitate a rape. Cases in which the drug is administered from proper motives, but the accused afterwards avails himself of the helplessness of the subject to commit the offense, are designed to be included. It is, indeed, doubtful whether, in the case of Reg. vs. Camplin, above cited, a convic-

tion would have been sustained independent of the circumstances, upon which some stress is laid by members of the Court, that the liquor was given with an unlawful intent, and that the prosecutrix indicated dissent by refusing the prisoner's solicitations as long as she had the power.

Subd. 5.—It can but rarely happen that the subject of the offense consciously submits to the act uncompelled, without being aware of its nature; yet some cases of this sort are reported. In *Reg. vs. Case*, 4 Cox Cr. Cas., p. 220, the defendant was a medical practitioner, and the prosecutrix was a young girl placed under his care for medical treatment. She made no resistance to the connection, owing to a belief, from representations of defendant, that she was submitting to medical treatment for the ailment under which she labored. *Held*, upon an indictment for assault, that the accused was rightly convicted. Her submission to the act under an impression that it was something necessary to her case was not such a consent as relieved the defendant from criminal responsibility. Whether it is to be regarded as possible that a connection should be accomplished during the unconsciousness of natural sleep, without arousing the female, is said to be an open question in medical jurisprudence.—See Beck's Med. Jur., 7th ed., p. 117; Tayl. Med. Jur., 5th ed., p. 654; Whart. & St. Med. Jur., p. 336, Secs. 440, 441; Montgomery on Pregnancy, 2d ed., p. 361; Bundelius, pp. 96, 99. Whether an unlawful connection so accomplished should be deemed, if proved, to amount to rape has been differently decided by the Courts.—See *Reg. vs. Sweenie*, 8 Cox Cr. Cas., p. 223; 3 Irvine, p. 159, in the affirmative, and *Field's Case*, 4 Leigh, p. 648; *Charles vs. State*, 6 Engl., p. 389, in the negative. It was thought best by the Commissioners, on a review of the authorities, not to specify this as one of the cases embraced. The danger of giving rise to unjust prosecutions in cases where the sleep was merely simulated, is to be weighed against that of the commission of the offense where the sleep is genuine.

Subd. 6.—Several cases are to be found in the reports, in which a criminal connection has been accomplished by means of personating the husband of the female. In England this is held not to be rape.—*Reg. vs. Clarke*, Dearsly, p. 397; 6 Cox Cr. Cas., p. 412; 18 Jur., p. 1059; 29 Eng. L. Eq., p. 542; *Rex vs. Jackson*, Russ & Ry., p. 487; *Reg. vs. Williams*, 8 Carr & P., p. 286;

Reg. vs. Saunders, id., p. 265. In Scotland it has been held to be rape.—Fraser's Case, Arkley, p. 329; Reg. vs. Sweenie, 8 Cox Cr. Cas., p. 223. In this country the question has been differently decided in the different States.—See Wyatt vs. State, 2 Swan., p. 394; Lewis vs. State, 30 Ala., p. 54; People vs. Bartow, 1 Wheel. Cr. Cas., p. 378, following the English view; and State vs. Shepard, 7 Conn., p. 54; Anon., 1 Wheel. Cr. Cas., p. 381, note, adopting the contrary. Without reviewing the reasoning of these cases, or questioning the soundness of the English decisions considered as exposition of the existing law, it is regarded that this offense fully partakes of the guilt of rape, and should share its punishment in all instances in which any means are used by the accused to create a belief that he is the husband.

When
physical
ability
must be
proved.

262. No conviction for rape can be had against one who was under the age of fourteen years at the time of the act alleged, unless his physical ability to accomplish penetration is proved as an independent fact, and beyond a reasonable doubt.

NOTE.—Many of the authorities lay down the rule as conclusive that incapacity is to be presumed when the accused is under fourteen years of age.—See 2 Bish. Cr. L., Sec. 936. In People vs. Randolph, 2 Park. Cr., p. 174, and Williams vs. State, 14 Ohio, p. 222, the presumption has been held capable of being rebutted by proof of actual capacity in the individual.

Penetra-
tion
sufficient.

263. The essential guilt of rape consists in the outrage to the person and feelings of the female. Any sexual penetration, however slight, is sufficient to complete the crime.

NOTE.—Robertson's Case, 1 Swint., p. 98.

Punish-
ment of
rape.

264. (§ 47.) Rape is punishable by imprisonment in the State Prison not less than five years.

NOTE.—Stats. 1855, p. 105, Sec. 1.

Abduction
of women.

265. Every person who takes any woman unlawfully, against her will, and by force, menace, or duress, compels her to marry him, or to marry any other person, or to be defiled, is punishable by imprisonment in

the State Prison not less than two nor more than fourteen years.

NOTE.—Stats. 1856, p. 131, Sec. 1.

266. Every person who inveigles or entices any unmarried female, of previous chaste character, under the age of eighteen years, into any house of ill-fame, or of assignation, or elsewhere, for the purpose of prostitution, or to have illicit carnal connection with any man; and every person who aids or assists in such inveiglement or enticement; and every person who, by any false pretenses, false representation, or other fraudulent means, procures any female to have illicit carnal connection with any man, is punishable by imprisonment in the State Prison not exceeding five years, or by imprisonment in a County Jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment.

Seduction
for
purposes of
prostitution.

NOTE.—The following statutes on kindred offenses are here inserted as supplementing this Code.—Stats. 1871-2, p. 184:

An Act to punish seduction.

[Approved March 1, 1872.]

[Enacting clause.]

SECTION 1. Every person who inveigles or entices any unmarried female, of previous chaste character, under the age of eighteen years, into any house of ill fame, or of assignation, or elsewhere, for the purpose of prostitution, and every person who aids or assists in such abduction for such purpose, and every person who by any false pretenses, false representation, or other fraudulent means, procures any female to have illicit carnal connection with any man, is punishable by imprisonment in the State Prison not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

This is identical with the Code section, except in the age of the female and term of the imprisonment.

Stats. 1871-2, p. 380:

An Act to punish adultery.

[Approved March 15, 1872.]

[Enacting clause.]

SECTION 1. Every person who lives in a state of open and notorious cohabitation and adultery is guilty of a misdemeanor, and is punishable by a fine not

exceeding one thousand dollars, or imprisonment in the County Jail not exceeding one year, or by both.

SEC. 2. If two persons, each being married to another, live together in a state of open and notorious cohabitation and adultery, each is guilty of a felony, and is punishable by imprisonment in the State Prison not exceeding five years.

SEC. 3. A recorded certificate of marriage, or a certified copy thereof, there being no decree of divorce, proves the marriage of a person for the purposes of this Act.

Abduction. 267. Every person who takes away any female under the age of eighteen years from her father, mother, guardian, or other person having the legal charge of her person, without their consent, for the purpose of prostitution, is punishable by imprisonment in the State Prison not exceeding five years, and a fine not exceeding one thousand dollars.

NOTE.—Under the analogous English statute (9 Geo. IV, Chap. XXI, Sec. 20), it has been held not to be necessary that the girl should be taken by force, either actual or constructive, or be taken out of the actual possession of the parent or guardian. It is enough if she be persuaded by the prisoner to leave her home, and the control of the parent continues down to the time of the taking.—Reg. vs. Monklow, 6 Cox Crim. Cas., p. 143; 22 L. J. M. C., p. 115; s. p., Reg. vs. Kipps, 4 Cox Cr. Cas., p. 167; Reg. vs. Frazer, 8 id., p. 446. So it has been held that the statute was satisfied, though the prisoner and the female quitted the house together in consequence of a proposition which emanated from the girl herself to that effect, and a statement by her to the prisoner that she intended to leave her father's house.—Reg. vs. Biswell, 2 Cox Cr. Cas., p. 279. As to what is to be deemed a person "having the legal charge of her person," in the case of an orphan child over whom no guardian has been appointed, see State vs. Ruhl, 8 Clarke, p. 447; Stats. Kansas, Sec. 324.

CHAPTER II.

ABANDONMENT AND NEGLECT OF CHILDREN.

SECTION 270. Omitting to provide child with necessities.

271. Deserting child.

270. Every parent of any child who willfully omits, without lawful excuse, to perform any duty imposed upon him by law, to furnish necessary food, clothing, shelter, or medical attendance for such child, is guilty of a misdemeanor.

Omitting to
provide
child with
necessaries

NOTE.—Consult the Civil Code for the provisions reported defining the duty of parental support. As to the criminality of a willful omission to perform this duty.—See Reg. vs. Chandler, 1 Jur. (N. S.), p. 429; 25 Law T., p. 133; Reg. vs. Gray, 7 Cox Cr. Cas., p. 326; 3 Jur. (N. S.), p. 988; Reg. vs S —, 5 Cox Cr. Cas., p. 279; Reg. vs. Philpot, 6 id., p. 140.

271. Every parent of any child under the age of six years, and every person to whom any such child has been confided for nurture or education, who deserts such child in any place whatever, with intent wholly to abandon it, is punishable by imprisonment in the State Prison not exceeding seven years, or in a County Jail not exceeding one year.

Deserting
child.

CHAPTER III.

ABORTIONS.

SECTION 274. Administering drugs, etc., with intent to produce miscarriage.

275. Submitting to an attempt to produce miscarriage.

274. Every person who provides, supplies, or administers to any pregnant woman, or procures any such woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage

Adminis-
tering
drugs, etc.,
with intent
to produce
miscar-
riage.

of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the State Prison not less than two nor more than five years.

NOTE.—*Provides.*—It is not necessary that the accused should be present when the drug, etc., is taken.—Reg. vs. Wilson, 1 Dears. & B., p. 127; Reg. vs. Farrow, 40 Eng. L. and Eq., p. 550; see, also, Reg. vs. Fretwell, 9 Cox Cr. Cases, p. 152. See, also, on this subject generally, People vs. Josselyn, 39 Cal., p. 396.

Submitting
to an
attempt to
produce
miscar-
riage

275. Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment in the State Prison not less than one nor more than five years.

NOTE.—The two preceding sections are based upon Stats. 1861, p. 588, Sec. 1.

CHAPTER IV.

CHILD STEALING.

SECTION 278. Definition and punishment of child stealing.

Definition
and pun-
ishment
of child
stealing.

278. Every person who maliciously, forcibly, or fraudulently takes or entices away any child under the age of twelve years, with intent to detain and conceal such child from its parent, guardian, or other person having the lawful charge of such child, is punishable by imprisonment in the State Prison not exceeding ten years, or by imprisonment in a County Jail not exceeding one year, and a fine not exceeding five hundred dollars.

NOTE.—Stats. 1856, p. 131, Sec. 2.

CHAPTER V.

BIGAMY, INCEST, AND THE CRIME AGAINST NATURE.

SECTION 281. Bigamy defined.

282. Exceptions.

283. Punishment of bigamy.

284. Marrying a husband or wife of another.

285. Incest.

286. Crime against nature.

287. Penetration sufficient to complete the crime.

281. (§ 121.) Every person having a husband or wife living, who marries any other person, except in the cases specified in the next section, is guilty of bigamy.

Bigamy
defined.

NOTE.—*What is proof of marriage.*—What is to be deemed a marriage is left to the operation of the rules of law governing that relation. It is generally understood that a marriage in fact must be proved, and that mere proof of reputation is not enough. In a recent case in the New York Court of Appeals this rule and its limit were carefully considered. In that case the prosecution to establish the fact of a recent marriage, called a witness who testified in substance that the prisoner conducted her to a house where he had taken rooms. The prisoner went out and returned with a person represented to be a minister. He was dressed like one, and had on a white neck-tie. She did not ask his name. The marriage ceremony was then performed by this person. He used the form of marriage of the Protestant Episcopal Church. He inquired of the witness if she would take the prisoner for her husband, and she replied in the affirmative; and the prisoner was asked if he would have her for his wife, and upon his replying affirmatively, the minister declared them man and wife. The person officiating gave her a certificate, using a partly printed form, and filling in the blanks by writing. The certificate was taken by the prisoner, and put in his trunk, and was afterwards seen by a sister of the witness, when the parties were living together as man and wife. This marriage ceremony was followed by cohabitation, which continued for about a year. *Held:* that even if to constitute a valid marriage, it must be solemnized by a minister or magistrate, the evidence was sufficient *prima facie* to prove a marriage in fact. A person appeared in the

character of a clergyman, performed the ceremony, and it was followed by cohabitation. If the person officiating was not a clergyman, it was for the prisoner to show that fact.—12 Vt., p. 396; 10 East, p. 282. In New York there may be a valid marriage, though not formally solemnized by a clergyman or consent declared before a magistrate. And in this case (*People vs. Haynes*, 25 N. Y., p. 390), it was held that if parties competent to contract, in the presence of witnesses, agree together to be husband and wife, and afterwards cohabit and recognize each other as such, it is a sufficient marriage to sustain an indictment for bigamy in the event of one of the parties having before that time married another, who is still living, and that it was not an error for the Judge to instruct the jury, that if the prisoner and the witness agreed, in the presence of the man represented to be a minister, to be man and wife, and afterwards lived together as such, that was, in the eye of the law, a sufficient marriage to sustain an indictment for bigamy; the fact that the prisoner had, before that time, married Sarah E. Blair, and she was then living, being admitted; and that it was of no consequence whether the man represented to be a minister was such or not. Marriage in this State is a civil contract, and does not require the intervention of a minister or magistrate to make it legal.—See Civil Code, Sec. 55; *Graham vs. Bennett*, 2 Cal., p. 503. Whether the prisoner's confession that his first wife was living when he contracted the second marriage is sufficient evidence, see *Reg. vs. Flaherty*, 2 Carr. & K., p. 782; *Laugtry vs. State*, 30 Ala., p. 536; *Gorman vs. State*, 23 Tex., p. 646. It was held in the case of *Graham vs. Bennett*, 2 Cal., p. 503, that no particular form was necessary to solemnize a marriage; an open avowal of an intention to become, and the assumption of the relative duties of, husband and wife, renders it valid and binding. This is now the law of this State, made so by Sec. 55, Civil Code Cal.; see note thereto where this relation is fully discussed. Under the law as it existed prior to the adoption of the Codes, it was held in the case of *People vs. Anderson*, 26 Cal., p. 129, that cohabitation as man and wife for a long time, and representing each other as such, was not proof of marriage for crim. con. divorce, indictment for bigamy, and similar cases; but under the Civil Code, Sec. 55, supra, this case would seem to be superseded. See, also, Civil Code, Vol. I, Secs. 55, 60, and notes.

282. The last section does not extend—

Exceptions

1. To any person by reason of any former marriage, whose husband or wife by such marriage has been absent for five successive years without being known to such person within that time to be living; nor,

2. To any person by reason of any former marriage which has been pronounced void, annulled, or dissolved by the judgment of a competent Court.

NOTE.—*Subd. 1.*—What proof of the defendant's *knowledge* that the former husband or wife was living when the second marriage was contracted is proper depends upon the facts of each case.—*Reg. vs. Ellis*, 1 Fost. & F., p. 309. Where the prisoner was indicted for bigamy, and no evidence was given on either side as to the prisoner's knowledge that his wife was alive, but it was proved that they had separated by agreement in 1843, and that in 1857 the prisoner produced her at a trial in which he was interested; *held*, that it was for the jury to say whether there was an absence of knowledge on the part of the prisoner that his wife was alive in 1855, the date of the second marriage.—*Reg. vs. Cross*, 1 Fost. & F., p. 510. Upon a trial for bigamy, where it appeared that the first husband had been continually absent from the prisoner for the space of seven years next preceding the second marriage, the jury being asked to consider whether she knew her husband to be alive at the time of the second marriage, and if not, whether she had had the means of acquiring the knowledge, found that they had no evidence of her knowledge, but were of opinion that she had the means of acquiring knowledge if she had chosen to make use of them; *held*, that upon that finding the conviction could not be sustained, inasmuch as it left it uncertain whether, in fact, she had or had not the knowledge.—*Reg. vs. Briggs*, 7 Cox Crim. Cas., p. 175. Express proof that the former husband or wife was living is not always required, but strong presumption of continued life may suffice.—See *Gorman vs. State*, 23 Tex., p. 646.

Subd. 2 is substantially part of Section 121 of the Crimes and Punishment Act, as amended.—Stats. 1861, p. 415. This and the preceding section are based on the statute referred to. Modifications have been made in the language.

Punish-
ment of
bigamy.

283. (§ 121.) Bigamy is punishable by fine not exceeding two thousand dollars and by imprisonment in the State Prison not exceeding three years.

NOTE.—Stats. 1861, p. 415, Sec. 1. For the crimes of seduction and adultery, see Acts of 1871-2, set out in note to Sec. 266, ante.

Marrying a
husband or
wife of
another.

284. (§ 122.) Every person who knowingly and willfully marries the husband or wife of another, in any case in which such husband or wife would be punishable under the provisions of this Chapter, is punishable by fine not less than two thousand dollars, or by imprisonment in the State Prison not exceeding three years.

NOTE.—Stats. 1861, p. 415, Sec. 122, modified. This section as it existed applied only to *unmarried* persons, the idea being, doubtless, that a married person who knowingly marries the husband or wife of another is punishable for the higher offense of bigamy by reason of his or her own previous marriage. But to sustain a prosecution for bigamy the people must be prepared to prove the first marriage of the accused. A case might arise in which a married person contracting a marriage with a husband or wife of another might escape an indictment for bigamy for want of evidence of an earlier marriage, and yet, if indicted under Section 122, quoted supra, defeat the prosecution by proof of such earlier marriage. Therefore the word “unmarried” was omitted. It may be remarked that by Section 654, post, it is provided that where an act or omission is made punishable in different ways by different provisions of this Code, it may be punished under either of said provisions, but not under more than one. Therefore, under the above sections, a person supposed to be married, and charged with marrying the husband or wife of another, may be indicted either for bigamy under Section 281, or for the felony prohibited by Section 284, according as it may be easiest to prove the former marriage of the accused or that of the person with whom the accused has now intermarried.

Incest.

285. (§ 123.) Persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who commit fornication or adultery

with each other, are punishable by imprisonment in the State Prison not exceeding ten years.

NOTE.—Incestuous marriages.—See Civil Code Cal., Vol. 1, p. 30, Sec. 59; see attempt to contract incestuous marriage.—People vs. Murray, 14 Cal., p. 159.

286. (§ 48.) Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the State Prison not less than five years.

Crime
against
nature.

287. Any sexual penetration, however slight, is sufficient to complete the crime against nature.

Penetra-
tion
sufficient
to complete
the crime.

NOTE.—Crim. Prac. Act, Sec. 374.

CHAPTER VI.

VIOLATING SEPULTURE AND THE REMAINS OF THE DEAD.

SECTION 290. Unlawful mutilation or removal of dead bodies. Not to apply to certain persons.

291. Unlawful removal of dead body from grave for dissection, etc.

292. Who are charged with the duty of burial.

293. Punishment for omitting to bury.

294. Who are entitled to custody of a body.

295. Arresting or attaching a dead body.

296. Defacing tombs and monuments.

290. Every person who mutilates, disinters, or removes from the place of sepulture the dead body of a human being without authority of law, is guilty of felony. But the provisions of this section do not apply to any person who removes the dead body of a relative or friend for reinterment.

Unlawful
mutilation
or removal
of dead
bodies.

Not to
apply to
certain
persons.

NOTE.—Stats. 1854, p. 20, Sec. 1. See Political Code, "Dissection," Secs. 3093-3095, and "Cemeteries and sepulture," Secs. 3105-3111.

291. Every person who removes any part of the dead body of a human being from any grave or other place where the same has been buried, or from any

Unlawful
removal of
dead body
from grave
for dissec-
tion, etc.

place where the same is deposited while awaiting burial, with intent to sell the same or to dissect it, without authority of law, or from malice or wantonness, is punishable by imprisonment in the State Prison not exceeding five years.

NOTE.—This section embraces the removal of a part only of the remains of a deceased person, and the removal of remains while yet unburied. In *Reg. vs. Sharpe*, 40 Eng. L. & Eq., p. 581, it appeared that the prisoner had, without leave, entered a burying ground, and without authority from the custodians, had disinterred a corpse, and removed it. The removal was conducted in a proper manner, the corpse was that of the prisoner's mother, and his motive for the removal was to bury her remains in a churchyard with the body of his father, then recently deceased. *Held*, that the disinterment was a misdemeanor. The mere fact that the defendant acted from praiseworthy motives, was no defense. Neither does the English law recognize the right of any one child to the corpse of its parent. It recognized no property in a corpse. Nor will relationship justify the taking of a corpse away from the grave where it has been buried. The section in the text has regard to the motives from which the act is done, and leaves a disinterment to pass without criminal punishment, if the unworthy motives specified in the section are not proved to have actuated the defendant, and if there was nothing in the manner of performing it amounting to an offense under other provisions of the Code.

Who are
charged
with the
duty of
burial.

292. The duty of burying the body of a deceased person devolves upon the persons hereinafter specified:

1. If the deceased was a married woman, the duty of burial devolves upon her husband;

2. If the deceased was not a married woman, but left any kindred, the duty of burial devolves upon the person or persons in the same degree nearest of kin to the deceased, being of adult age, and within this State, and possessed of sufficient means to defray the necessary expenses;

3. If the deceased left no husband nor kindred answering the foregoing description, the duty of burial

devolves upon the Coroner conducting an inquest upon the body of the deceased, if any such inquest is held; if there is none, then upon the persons charged with the support of the poor in the locality in which the death occurs; Same.

4. In case the person upon whom the duty of burial is cast by the foregoing provisions omits to make such burial within a reasonable time, the duty devolves upon the person next specified; and if all omit to act, it devolves upon the tenant; or if there is no tenant, upon the owner of the premises or master; or if there is no master, upon the owner of the vessel in which the death occurs or the body is found.

293. Every person upon whom the duty of making burial of the remains of a deceased person is imposed by law, who omits to perform that duty within a reasonable time, is guilty of a misdemeanor; and, in addition to the punishment prescribed therefor, is liable to pay to the person performing the duty in his stead treble the expenses incurred by the latter in making the burial, to be recovered in a civil action. Punishment for omitting to bury.

294. The person charged by law with the duty of burying the body of a deceased person is entitled to the custody of such body for the purpose of burying it; except that in the case in which an inquest is required by law to be held upon a dead body by a Coroner, such Coroner is entitled to its custody until such inquest has been completed. Who are entitled to custody of a body.

295. Every person who arrests or attaches any dead body of a human being, upon any debt or demand whatever, or detains or claims to detain it for any debt or demand, or upon any pretended lien or charge, is guilty of a misdemeanor. Arresting or attaching a dead body.

NOTE.—The four preceding sections are taken from the New York Penal Code (Secs. 352, 353, 354, 359) and were deemed necessary when such notices as the follow-

ing appeared in our papers: "A Chinaman, arrested some days since for dumping the dead bodies of his countrywomen on the streets, instead of burying them, pleaded guilty to the offense against the common law." *Sacramento Union*, Oct. 11th, 1870.

Defacing
tombs and
monu-
ments.

296. Every person who willfully and maliciously defaces, breaks, destroys, or removes any tomb, monument, or gravestone, erected to any deceased person,

297. Every person who shall bury to be buried or interred, the dead body of a human being, or any human remains, in any corporate limits of any city or town within the corporate limits of the city of San Francisco, except in a cemetery, or where now existing under the laws of this State, or where interments have been made, or that hereafter be established or organized by the Board of Supervisors of the county, or city and county, shall be guilty of a misdemeanor. [Amended 1874. Effect immediately.]

, or any ornamental plant, to the place of burial of a person, or mark, deface, injure, deposit, or wall of any building, shall be guilty of a misdemeanor.

This section is based upon Sec. 2 of the Act to protect the bodies of deceased persons, and an Act to protect cemeteries (Stats. 1868, p. 26), and the provisions thereof. See other sections relating to the burial and registering same.—Penal Code, §§ 3074-3082.

CHAPTER VII.

OF CRIMES AGAINST RELIGION AND CONSCIENCE, AND OTHER OFFENSES AGAINST GOOD MORALS.

SECTION 299. Barbarous and noisy amusements, and theaters where liquors are sold, prohibited on Sunday.

300. Keeping open places of business on Sunday.

301. Limitation on operation of preceding section.

302. Disturbing religious meetings.

303. Sale of liquors at theaters and employing women to sell liquors thereat.

304. Selling liquors at camp meeting.

305. Limitation of preceding section.

306. Procuring female under seventeen years of age to play musical instruments in public. Female under seventeen playing musical instruments in public.

307. Procuring female under seventeen years of age to exhibit herself for hire. Female under seventeen exhibiting herself for hire.

299. Every person who, on the christian Sabbath, gets up, exhibits, opens, or maintains, or aids in getting up, exhibiting, opening, or maintaining any bull, bear, cock, or prize fight, horse race, circus, gambling house, or saloon, or any barbarous and noisy amusement, or who keeps, conducts, or exhibits any theater, melodeon, dance cellar, or other place of musical, theatrical, or operatic performance, spectacle, or representation where any wines, liquors, or intoxicating drinks are bought, sold, used, drank, or given away, or who purchases any ticket of admission, or directly or indirectly pays any admission fee to or for the purpose of witnessing or attending any such place, amusement, spectacle, performance, or representation, is guilty of a misdemeanor.

Barbarous and noisy amusements, and theaters where liquors are sold, prohibited on Sunday.

NOTE.—Stats. 1870, p. 52, Sec. 1; see note to Sec. 4, Art. 1, Const. of the State, Appendix to Political Code Cal.; *Ex Parte Newman*, 9 Cal., p. 502; the Act of 1861, p. 655, "For the observance of the Sabbath," held to be constitutional.—*Ex Parte Andrews*, 18 Cal., p. 678; see, also, *Ex Parte Bird*, 19 Cal., p. 130.

300. Every person who keeps open on Sunday any store, workshop, bar, saloon, banking house, or other place of business, for the purpose of transacting business therein, is punishable by fine not less than five nor more than fifty dollars.

Keeping open places of business on Sunday.

NOTE.—Stats. 1861, p. 655, Sec. 1. Contracts made on Sunday were held not to be void in *Moore vs. Murdock*, 26 Cal., p. 514, so that unless this section existed, making certain business on Sunday unlawful, contracts in and about it would be binding, though made on Sunday. See, also, *Ex Parte Bird*, 19 Cal., p. 130.

301. The provisions of the preceding section do not apply to persons who, on Sunday, keep open hotels, boarding houses, barber shops, baths, markets, restaurants, taverns, livery stables, or retail drug stores for the legitimate business of each, or such manufac-

Limitation on operation of preceding section.

turing establishments as are usually kept in continued operation.

NOTE.—Stats. 1861, p. 665, Sec. 2.

Disturbing
religious
meetings.

302. (§ 171.) Every person who willfully disturbs or disquiets any assemblage of people met for religious worship by noise, profane discourse, rude, or indecent behavior, or by any unnecessary noise, either within the place where such meeting is held, or so near ~~the~~ the order and solemnity of the

302. At common wearing was
when repeated so often as to bec
the public, and thus *Ex-p*

code of Tennessee, Secs. 48, 52.

479.

Sale of
liquors at
theaters,
and
employing
women to
sell liquors
thereat.

303. Every person who sells or furnishes any malt, vinous, or spirituous liquors to any person in the auditorium or lobbies of any theater, melodeon, museum, circus, or caravan, or place where any farce, comedy, tragedy, ballet, opera, or play is being performed, or any exhibition of dancing, juggling, wax work figures and the like is being given for public amusement, and every person who employs or procures, or causes to be employed or procured, any female to sell or furnish any malt, vine

306. Every person who causes, procures, or employs a female for hire, drink, or gain, to play upon any musical instrument, or to dance, promenade, or otherwise exhibit herself, in any drinking saloon, dance cellar, ballroom, public garden, public highway, common, park, or street, or in any ship, steamboat, or railroad car, or in any place whatsoever, if in such place there is connected therewith the sale or use, as a beverage, of any intoxicating, spirituous, vinous, or malt liquors; or who shall allow the same in any premises under his control, where intoxicating, spirituous, vinous, or malt liquors are sold or used, when two or more persons are present, is punishable by a fine not less than fifty nor more than five hundred dollars, or by imprisonment in the County Jail not exceeding three months, or by both; and every female so playing upon any musical instrument, or dancing, promenading, or exhibiting herself, as herein aforesaid, is punishable by a fine not exceeding one hundred dollars, or by imprisonment in the County Jail not exceeding one month, or by both. (Approved March 30th, 1874.)

Sec. 3. •

Who keeps a booth, for the purpose of selling wine, or spirituous liquors, of which wines form a part, or for any article of merchandise, about any such camp or field, at the time of holding a fair, is punishable by a fine of not less than five dollars.

Sec. 1.

305. The provisions of the preceding section do not apply to any person carrying on a regular business in the sale of liquors or other articles, which business was established prior to the appointment of the meeting referred to in such section.

NOTE.—Stats. 1859, p. 188, Sec. 1.

Limitation
of preced-
ing section.

Procuring
female
under
seventeen
years of
age to play
musical
instru-
ments
in public.

306. Every person who causes, procures, or employs any female to play for hire, drink, or gain, upon any musical instrument, in any drinking saloon, ball room, dance cellar, public garden, or any public highway, common or street, or on a ship, steamboat, or railroad car, is punishable by fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding three months, or by both; and any female so playing upon any musical instrument whatsoever, is punishable by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding one month, or by both. (Approved March 10, 1874.)

Female
under
seventeen
playing
musical
instru-
ments
in public.

or by imprisonment in the County Jail not exceeding one month, or by both.

NOTE.—Stats. 1860, p. 86, Sec. 1.

307. Every person who causes, or procures, or employs any female to dance, promenade, or otherwise exhibit herself for hire, drink, or gain, in any drinking saloon, dance cellar, ball room, public garden, public highway, or any place of a similar character, is punishable by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding three months, or by both; and every female so dancing, promenading, or exhibiting herself, is punishable by fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding one month, or by both. [Approved March 10, 1874; 61 days.]

Procuring
female
under
seventeen
years of
age to
exhibit
herself
for hire.

Female
under
seventeen
exhibiting
herself
for hire.

307 of the Penal Code, as amended by an Act entitled "An Act to amend sections three hundred and sixty and three hundred and seven of the Penal Code," approved March tenth, eighteen hundred and seventy-four, is hereby repealed. [Approved March 30th, 1874]

hundred dollars, or by imprisonment in the County Jail not exceeding one month, or by both.

NOTE.—Stats. 1860, p. 86, Sec. 2; 1863, p. 253, Sec. 3. For a full discussion of the constitutional and other questions incidentally arising under this Chapter, see *Ex Parte Keating*, 38 Cal., p. 702, et seq.

The following offense on a kindred subject is punished by Stats. 1871-2, p. 231:

An Act to prevent the sale of intoxicating drinks to minors.

[Approved March 4, 1872.]

[Enacting clause.]

SECTION 1. Every person who sells or gives to another under the age of sixteen years, to be by him drank at the time as a beverage, any intoxicating drink, is guilty of a misdemeanor, and punishable by a fine not exceeding one hundred dollars, or by imprisonment in the County Jail not exceeding three months; *provided*, that nothing in this Act shall be deemed to apply to parents of such children, or guardians of their wards, or physicians.

CHAPTER VIII.

INDECENT EXPOSURE, OBSCENE EXHIBITIONS, BOOKS AND PRINTS, AND BAWDY AND OTHER DISORDERLY HOUSES.

SECTION 311. Indecent exposures, exhibitions, and pictures.

312. Seizure of indecent articles authorized.

313. Their character to be summarily determined.

314. Their destruction.

315. Keeping or residing in a house of ill-fame.

316. Keeping disorderly houses.

Indecent exposures, exhibitions, and pictures.

~~311. Every person who willfully and lewdly, either—~~

~~1. Exposes his person or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or,~~

~~2. Procures, counsels, or assists any person so to expose himself, or to take part in any model artist ex-~~

AD
1840
New Section
309

311. Every person who willfully and lewdly, either

1. Exposes his person, or the private parts thereof in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or, 131

2. Procures, counsels, or assists any person so expose himself, or to take part in any model art exhibition, or to make any other exhibition of himself to public view, or to the view of any number of persons such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts; or,

3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene scene or indecent picture or print; or moulds, cuts, casts, or otherwise makes any obscene or indecent figure; or

4. Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print, or figure; or,

5. Sings any lewd or obscene song, ballad, or other words, in any public place, or in any place where there are persons present to be annoyed thereby—Is guilty of a misdemeanor.

310

NOTE.—This and the three succeeding sections are based upon an Act relative to obscene and lewd publications (Stats. 1859, p. 297), and an Act relative to injurious publications (Stats. 1858, p. 204), extended to embrace cases not included within those Acts, but which deserve like punishments, and follow the language of the New York Penal Code, Secs. 363, 365, 366. See *Reg. vs. Holmes*, 22 Law & J. M. C., p. 122; *Reg. vs. Watson*, 2 Cox Cr. Cas., p. 376; *Reg. vs. Webb*, 3 id., p. 183; *Reg. vs. Orchard*, id., p. 248; *Dugdale vs. Queen*, 1 El. & B., p. 435.

312. Every person who is authorized or enjoined to arrest any person for a violation of Subdivision 3 of the last section, is equally authorized and enjoined to seize any obscene or indecent writing, paper, book, picture, print, or figure found in possession or under the control of the person so arrested, and to deliver the same to the magistrate before whom the person so arrested is required to be taken.

Seizure of
indecent
articles
authorized.

Their
character
to be
summarily
determined

313. The magistrate to whom any obscene or indecent writing, paper, book, picture, print, or figure is delivered, pursuant to the foregoing section, must, upon the examination of the accused, or, if the examination is delayed or prevented, without awaiting such examination, determine the character of such writing, paper, book, picture, print, or figure, and if he finds it to be obscene or indecent, he must deliver one copy to the District Attorney of the county in which the accused is liable to indictment or trial, and must at once destroy all the other copies.

Their
destruction

314. Upon the conviction of the accused, such District Attorney must cause any writing, paper, book, picture, print, or figure, in respect whereof the accused stands convicted, and which remains in the possession or under the control of such District Attorney, to be destroyed.

Keeping or
residing in
a house of
ill-fame.

315. Every person who keeps a house of ill-fame in this State, resorted to for the purposes of prostitution or lewdness, or who willfully resides in such house, is guilty of a misdemeanor.

NOTE.—Stats. 1855, p. 76, Sec. 1; *Abrahams vs. State*, 4 Iowa, p. 541; *State vs. Abrahams*, 6 Clarke, p. 117.

Keeping
disorderly
houses.

316. Every person who keeps any disorderly house or any house of public resort, by which the peace, comfort, or decency of the immediate neighborhood is habitually disturbed, or who keeps any inn in a disorderly manner, is guilty of a misdemeanor.

317. Every person who willfully writes, composes, or publishes any notice or advertisement of any medicine or means for producing or facilitating a miscarriage or abortion, or for the prevention of conception, or who offers his services by any notice, advertisement, or otherwise, to assist in the accomplishment of any such purpose, is guilty of a felony.

New Sec 318

SECTION 321. Punishment for selling lottery tickets.

322. Aiding lotteries.

323. Lottery offices. Advertising lottery offices.

324. Insuring lottery tickets. Publishing offers to insure.

325. Property offered for disposal in lottery forfeited.

326. Letting building for lottery purposes.

319. A lottery is any scheme for the disposal or Lottery
defined.
distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known.

NOTE.—This and the succeeding sections relating to lotteries are founded upon an Act to prohibit lotteries, etc.—Stats. 1861, p. 229. No material changes in the legal effect have been made; but the law follows the language of the New York Penal Code, having in view greater terseness of expression.—Governor of Almshouse vs. American Art Union, 7 N. Y., p. 228; Bouvier's Law Dict., Tit. "Lottery;" Mass. Gen. Stat., p. 823, Sec. 1. In the popular use of the above mentioned terms a lottery is a distribution by chance of *several* prizes among purchasers of separate chances; a raffle is a disposal by chance of a *single* prize among purchasers of separate chances; and a gift enterprise is a disposal of property in mass to a body of shareholders, upon an understanding or expectation that they will decide it among themselves by chance. But as all schemes of this description are involved in a common condemnation and punishment, to retain these distinctions in the statute book would serve no important purpose in defining the offense, while it would embarrass prosecutions by suggesting questions as to the requisite averments in the indictment. The law has, therefore, defined the word "lottery" broad enough to cover all these homogeneous devices, in order that that word may be intelligibly used as including all. As to unlawfulness of "gift enterprises," see Wooden vs. Shotwell, 4 Zab., p. 789; Bell vs. State, 5 Sneed, p. 507. Our State Const., Art. IV, Sec. 27, reads as follows: "No lottery shall be

authorized by this State, nor shall the sale of lottery tickets be allowed;" very similar to the N. Y. Const. of 1846, Art. I, Sec. 10, which reads: "Nor shall **any** lottery hereafter be authorized, or any sale of lottery tickets allowed within this State." These constitutional provisions have rendered obsolete many of the distinctions of former laws relative to lotteries, and permits these enactments to be much more brief and simple than former ones, while they are also in reality more stringent. It may here be remarked that, in view of the law by which all lotteries are made unlawful, lottery tickets are no longer to be regarded as the subject of property which the law will be sedulous to protect.

Punish-
ment for
drawing
lottery.

320. Every person who contrives, prepares, sets up, proposes, or draws any lottery, is guilty of a misdemeanor.

Punish-
ment for
selling
lottery
tickets.

321. Every person who sells, gives, or in any manner whatever, furnishes or transfers to or for any other person any ticket, chance, share, or interest, or any paper, certificate, or instrument purporting or understood to be or to represent any ticket, chance, share, or interest in, or depending upon the event of any lottery, is guilty of a misdemeanor.

NOTE.—In *Ex Parte William Smith*, 40 Cal., p. 419, it was held that the general law punishing the sale of lottery tickets was not repealed by the Mercantile Library Lottery Act of 1870.

Aiding
lotteries.

322. Every person who aids or assists, either by printing, writing, advertising, publishing, or otherwise in setting up, managing, or drawing any lottery, or in selling or disposing of any ticket, chance, or share therein, is guilty of a misdemeanor.

Lottery
offices.

323. Every person who opens, sets up, or keeps, by himself or by any other person, any office or other place for the sale of, or for registering the number of any ticket in any lottery, or who, by printing, writing, or otherwise, advertises or publishes the setting up,

Advertis-
ing lottery
offices.

opening, or using of any such office, is guilty of a misdemeanor.

324. Every person who insures or receives any consideration for insuring for or against the drawing of any ticket in any lottery whatever, whether drawn or to be drawn within this State or not, or who receives any valuable consideration upon any agreement to repay any sum, or deliver the same, or any other property, if any lottery ticket or number of any ticket in any lottery shall prove fortunate or unfortunate, or shall be drawn or not be drawn, at any particular time or in any particular order, or who promises or agrees to pay any sum of money, or to deliver any goods, things in action, or property, or to forbear to do anything for the benefit of any person, with or without consideration, upon any event or contingency dependent on the drawing of any ticket in any lottery, or who publishes any notice or proposal of any of the purposes aforesaid, is guilty of a misdemeanor.

Insuring
lottery
tickets.

Publishing
offers to
insure.

NOTE.—See Secs. 2531, 2532, Civil Code Cal.

325. All moneys and property offered for sale or distribution in violation of any of the provisions of this Chapter are forfeited to the State, and may be recovered by information filed, or by an action brought by the Attorney General, or by any District Attorney, in the name of the State. Upon the filing of the information or complaint, the Clerk of the Court, or if the suit be in a Justice's Court, the Justice, must issue an attachment against the property mentioned in the complaint or information, which attachment has the same force and effect against such property, and is issued in the same manner as attachments issued from the District Courts in civil cases.

Property
offered for
disposal in
lottery
forfeited.

326. Every person who lets, or permits to be used, any building or vessel, or any portion thereof, knowing that it is to be used for setting up, managing, or draw-

Letting
building
for lottery
purposes.

ing any lottery, or for the purpose of selling or disposing of lottery tickets, is guilty of a misdemeanor.

NOTE.—See note to Sec. 319, ante. It was held that injunction lies to restrain and enjoin disposition of prizes pending suits therefor in Justices' Courts, in *People vs. Kent*, 6 Cal., p. 89.—See Sec. 2532, Civil Code Cal.

CHAPTER X.

GAMING.

SECTION 330. Gaming prohibited. Penalty.

331. Permitting gambling in houses owned or rented.

332. Winning at play by fraudulent means.

333. Witnesses neglecting or refusing to attend trial.

334. Witness' privilege.

335. Duties of District Attorneys, Sheriffs, and others.

Gaming
prohibited.

330. Every person who deals, plays, or carries on, opens or causes to be opened, or who conducts, either as owner or employé, whether for hire or not, any game of faro, monté, roulette, lansquenet, rouge et noire, rondo, or any banking game played with cards, dice, or any other device, for money, checks, credit, or any other representative of value, is punishable by fine of not less than two hundred nor more than one thousand dollars, and shall be imprisoned in the County Jail until such fine and costs of prosecution are paid, such imprisonment not to exceed one year.

Penalty.

NOTE.—Stats. of 1863, p. 723, Sec. 1; *People vs. Saviers*, 14 Cal., p. 29. The Act of 1857, to prohibit gaming, declared constitutional in *People vs. Beatty*, 14 Cal., p. 566.—See *People vs. Markham*, 7 Cal., p. 208. Licensing gambling did not make a gambling debt recoverable at law.—*Bryant vs. Mead*, 1 Cal., p. 441; and *Carrier vs. Brannan*, 3 Cal., p. 328. Without a license gaming was a violation of the *then* law.—*People vs. Raynes*, 3 Cal., p. 366. Gambling debt or money lost cannot be recovered at law.—*Gahlan vs. Neville*, 2 Cal., p. 81.

331. Every person who knowingly permits any of the games mentioned in the preceding section to be played, conducted, or dealt in any house owned or rented by such person, in whole or in part, is punishable as provided in the preceding section.

Permitting gambling in houses owned or rented.

NOTE.—Stats. 1860, p. 69, Sec. 4. Under a former Act the owner of a house used for gaming purposes was not liable for fine imposed for gaming; owner, however, liable where gaming is done with his knowledge, both under the former Act and the text.—People vs. Markham, 7 Cal., p. 208. The former Act of 1857 is not materially different from the text or the Act of 1860.

332. Every person who, by any fraud, cheat, or device, or false pretense whatsoever, while playing at any game of chance, or while bearing any share in wagers played for, or while betting on sides or hands of such play, wins or acquires to himself or another any sum of money or valuable thing, is guilty of a misdemeanor.

Winning at play by fraudulent means.

NOTE.—This section is similar to Sec. 388 of New York Penal Code.

333. Every person duly summoned as a witness for the prosecution, on any proceedings had under this Chapter, who neglects or refuses to attend, as required, is guilty of a misdemeanor.

Witnesses neglecting or refusing to attend trial.

NOTE.—Stats. 1860, p. 69, Sec. 5. See, also, "means of production" of evidence, Chap. II, Title III, Part IV, Co. Civ. Pro. Cal.

334. No person, otherwise competent as a witness, is disqualified from testifying as such concerning the offense of gaming, on the ground that such testimony may criminate himself; but no prosecution can afterwards be had against him for any offense concerning which he testified.

Witness' privilege.

NOTE.—Stats. 1860, p. 69, Sec. 2.

Duties of
District
Attorneys,
Sheriffs,
and others.

335. Every District Attorney, Sheriff, Constable, or police officer must inform against and diligently prosecute persons whom they have reasonable cause to believe offenders against the provisions of this Chapter, and every such officer refusing or neglecting so to

336. Every owner or lessee, or keeper of used in whole, or in part, as a saloon or drir who knowingly permits any person under years of age to play at any game of chance guilty of a misdemeanor. [Approved M. 1874.]

23, Sec. 1. This Chapter is 860, p. 69, and the statute of e has been modified.

CHAPTER XI.

PAWNBROKERS.

SECTION 338. Pawnbroking without license.

339. Failing to keep a register.

340. Charging unlawful rate of interest.

341. Selling before time of redemption has expired, or without notice.

342. Refusing to disclose particulars of sale.

343. Refusing to allow an officer with search warrant to inspect register of pledged articles.

Pawnbrok-
ing without
license.

338. Every person who carries on the business of a pawnbroker, by receiving goods in pledge for loans at any rate of interest above the rate of ten per cent per annum, except by authority of a license, is guilty of a misdemeanor.

NOTE.—Limiting the interest which may be charged by pawnbrokers is not repugnant to Sec. 2, Art. I, State Const.—*Jackson vs. Shawl*, 29 Cal., p. 267; see Act of 1871-2, p. 684. Receiving in pledge articles from persons under the age of sixteen years inserted as Sec. 501, post; see Civil Code Cal., Secs. 2986-3011, and notes.

Failing to
keep a
register.

339. Every person who carries on the business of a pawnbroker, who fails at the time of the transaction to enter in a register kept by him for that purpose, in the English language, the date, duration, amount, and rate of interest of every loan made by him, or an accurate description of the property pledged, or the name

and residence of the pledgor, or to deliver to the pledgor a written copy of such entry, or to keep an account in writing of all sales made by him, is guilty of a misdemeanor.

340. Every pawnbroker who charges or receives interest at the rate of more than four per cent per month, or who, by charging commissions, discount, storage, or other charge, or by compounding increases or attempts to increase such interest, is guilty of a misdemeanor.

Charging
unlawful
rate of
interest.

341. Every pawnbroker who sells any article pledged to him and unredeemed, until it has remained in his possession six months after the last day fixed by contract for redemption, or who makes any sale without publishing in a newspaper printed in the city, town, or county, at least five days before such sale, a notice containing a list of the articles to be sold, and specifying the time and place of sale, is guilty of a misdemeanor.

Selling
before
time of
redemption
has
expired,
or without
notice.

342. Every pawnbroker who willfully refuses to disclose to the pledgor or his agent the name of the purchaser and the price received by him for any article received by him in pledge and subsequently sold, or who, after deducting from the proceeds of any sale the amount of the loan and interest due thereon, and four per cent on the loan for expenses of sale, refuses, on demand, to pay the balance to the pledgor or his agent, is guilty of a misdemeanor.

Refusing
to disclose
particulars
of sale.

343. Every pawnbroker who fails, refuses, or neglects to produce for inspection his register, or to exhibit all articles received by him in pledge, or his account of sales, to any officer holding a warrant authorizing him to search for personal property, or the order of a committing magistrate directing such officer to inspect

Refusing
to allow
an officer
with search
warrant
to inspect
register of
pledged
articles.

such register, or examine such articles or account of sales, is guilty of a misdemeanor.

NOTE.—The six preceding sections are based on the provisions of the Act of April 17th, 1861, relating to pawnbrokers. (Stats. 1861, p. 184.) Secs. 339, 342, 343 are applicable to junk dealers. See Sec. 502, post.

CHAPTER XII.

OTHER INJURIES TO PERSONS.

SECTION 346. Acts of intoxicated physicians.

- 347. Willfully poisoning food, medicine, or water.
- 348. Mismanagement of steamboats.
- 349. Mismanagement of steam boilers.
- 350. Counterfeiting trade marks.
- 351. Selling goods which bear counterfeit trade marks.
- 352. Definition of the phrase "counterfeited trade marks," etc.
- 353. "Trade mark" defined.
- 354. Refilling casks, etc., bearing trade mark.
- 355. Defacing marks upon wrecked property and destroying bills of lading.
- 356. Defacing marks upon logs, lumber, or wood.
- 357. Altering brands.
- 358. Frauds in affairs of special partnership.
- 359. Contracting or solemnizing incestuous or forbidden marriages.
- 360. Making false return or record of marriage.
- 361. Cruel treatment of lunatics, etc.
- 362. Refusing to issue or obey writ of habeas corpus.
- 363. Reconfining persons discharged upon writ of habeas corpus.
- 364. Concealing persons entitled to benefit of habeas corpus.
- 365. Innkeepers and carriers refusing to receive guests and passengers.
- 366. Counterfeiting quicksilver stamps.
- 367. Selling debased quicksilver.

Acts of
intoxicated
physicians.

346. Every physician who, in a state of intoxication, does any act as such physician to another person by which the life of such other person is endangered, is guilty of a misdemeanor.

NOTE.—Intoxication has been carefully considered by the Sup. Court of Cal. in connection with the com-

mission of crime in the cases of *People vs. Nichol*, 34 Cal., p. 212; *People vs. Belencia*, 21 id., p. 544; *People vs. King*, 27 id., p. 507; *People vs. Harris*, 29 id., p. 678.

347. Every person who willfully mingles any poison with any food, drink, or medicine, with intent that the same shall be taken by any human being, to his injury, and every person who willfully poisons any spring, well, or reservoir of water, is punishable by imprisonment in the State Prison for a term not less than one nor more than ten years.

Willfully poisoning food, medicine, or water.

NOTE.—Founded upon Sec. 3 of Act of 1856, relative to offenses against the person (Stats. 1856, p. 131), and extended to include cases deserving like punishment, and in this respect corresponds with the Penal Code of N. Y., Sec. 405; see note to Sec. 350, post.

348. Every captain or other person having charge of any steamboat used for the conveyance of passengers, or of the boilers and engines thereof, who, from ignorance or gross neglect, or for the purpose of excelling any other boat in speed, creates, or allows to be created, such an undue quantity of steam as to burst or break the boiler, or any apparatus or machinery connected therewith, by which bursting or breaking human life is endangered, is guilty of a felony.

Mismanagement of steamboats

meanor.

NOTE.—See note to Secs. 349, 350, post.

349. Every engineer or other person having charge of any steam boiler, steam engine, or other apparatus for generating or employing steam, used in any manufactory, railway, or other mechanical works, who willfully, or from ignorance, or gross neglect, creates, or allows to be created, such an undue quantity of steam as to burst or break the boiler or engine, or apparatus, or causes any other accident whereby human life is endangered, is guilty of a felony.

Mismanagement of steam boilers.

dangerous, is guilty of a felony.

NOTE.—See Secs. 43, 1708, 1714, 1838, and 2194, Civil Code Cal., on the subject of injuries, etc. Negligence. Id., Sec. 17. Sec. 7, Subd. 2, ante. Willfully.—Id., Subd. 1. Diligence.—Civil Code Cal., Sec. 16.

Counter-
feiting
trade
marks.

350. Every person who willfully forges or counterfeits, or procures to be forged or counterfeited, any trade mark usually affixed by any person to his goods, with intent to pass off any goods to which such forged or counterfeited trade mark is affixed or intended to be affixed, as the goods of such person, is guilty of a misdemeanor.

NOTE.—This and the three succeeding sections are based upon the Act of March 3d, 1853.—Stats. 1853, p. 33. Their object is the protection of the purchaser as well as the manufacturer, and for this reason include within their scope everything that falls within the broadest definition of “trade mark.” The remaining sections of this Chapter, relative to trade marks, are based upon the Act of April 3d, 1863 (Stats. 1863, p. 155), and are limited in their operation to the statutory trade marks, etc.—N. Y. P. C., Secs. 410, 412. The subject of the text in this section is becoming yearly more and more important. It is similar in import to the New York statutes (Laws of 1862, Chap. 306, Sec. 1), the phraseology being rendered more concise, and the punishment being reduced from an imprisonment not less than six months and not more than twelve, or a fine not exceeding five thousand dollars, to that of a misdemeanor. The subject of counterfeiting trade marks, including the kindred topic of refilling and selling stamped mineral water bottles, has received the careful attention of the New York Legislature. In 1845 an Act was passed (Laws of 1845, Chap. 279) punishing the forgery of stamps or labels. In 1850 the provisions of this Act were somewhat enlarged. In 1862 both these Acts were repealed, and a more comprehensive and stringent statute was passed (Laws of 1862, Chap. 306), which, with an amendment enacted in 1863 (Laws of 1863, Chap. 209), giving the party aggrieved a civil remedy in addition to the fine and imprisonment prescribed by the Act of 1862, embodies the law existing at the present time, upon the general subject of counterfeiting trade marks. Such is the history of New York legislation on this subject. Our State is not, as yet, fully launched on the sea of manufactures, but it is time the subject of their protection should be encouraged in so far as the advantages of trade marks are concerned. The kindred offense of selling mineral waters, water bottles, and others bearing the stamp of a particular manufacturer, is made punishable by Sec. 354, post, of this Chapter. The

text of this Chapter is carefully drawn, retrenching the phraseology and modifying the measure of punishment to correspond with the forms of expression used and penalties prescribed throughout the Code, adopting some of the provisions of a very stringent English statute on this subject, passed in 1862, the 25th and 26th Vict., Chap. 88. See "Trade marks," Civil Code Cal., Secs. 655, 991, and notes; Pol. Code Cal., Secs. 3196-3199, and notes.

351. Every person who sells or keeps for sale any goods upon or to which any counterfeited trade mark has been affixed, intending to represent such goods as the genuine goods of another, knowing the same to be counterfeited, is guilty of a misdemeanor.

Selling goods which bear counterfeit trade marks.

NOTE.—Selling or offering to sell goods having a trade mark thereon warrants the mark to be genuine.—See Civil Code Cal., Sec. 1772.

352. The phrases "forged trade mark" and "counterfeited trade mark," or their equivalents, as used in this Chapter, include every alteration or imitation of any trade mark so resembling the original as to be likely to deceive.

Definition of the phrase "counterfeited trade marks," etc.

353. The phrase "trade mark," as used in the three preceding sections, includes every description of word, letter, device, emblem, stamp, imprint, brand, printed ticket, label, or wrapper usually affixed by any mechanic, manufacturer, druggist, merchant, or tradesman, to denote any goods to be goods imported, manufactured, produced, compounded, or sold by him, other than any name, word, or expression generally denoting any goods to be of some particular class or description.

"Trade mark" defined.

NOTE.—See 26 Vict., Chap. 88, Sec. 1; N. Y. Pol. Code, Sec. 414.

354. Every person who has or uses any cask, bottle, vessel, case, cover, label, or other thing bearing or having in any way connected with it the duly filed trade mark or name of another, for the purpose of dis-

Refilling casks, etc., bearing trade mark

posing with intent to deceive or defraud of any article other than that which such cask, bottle, vessel, case, cover, label, or other thing originally contained or was connected with by the owner of such trade mark or name, is guilty of a misdemeanor.

NOTE.—Stats. 1863, p. 155, Sec. 6. See notes to Secs. 349, 350, 351, ante.

Defacing
marks upon
wrecked
property
and
destroying
bills of
lading.

355. Every person who defaces or obliterates the marks upon wrecked property, or in any manner disguises the appearance thereof, with intent to prevent the owner from discovering its identity, or who destroys or suppresses any invoice, bill of lading, or other document tending to show the ownership, is guilty of a misdemeanor.

NOTE.—See Secs. 2403–2418, “Wrecks and Wrecked Property,” Pol. Code Cal.

Defacing
marks
upon logs,
lumber, or
wood.

356. Every person who cuts out, alters, or defaces any mark made upon any log, lumber, or wood, or puts a false mark thereon with intent to prevent the owner from discovering its identity, is guilty of a misdemeanor.

NOTE.—See “Floating Lumber,” Pol. Code Cal., Secs. 2389–2393.

Altering
brands.

357. (§ 65.) Every person who marks or brands, alters, or defaces the mark or brand of any horse, mare, colt, jack, jennet, mule, bull, ox, steer, cow, calf, sheep, goat, hog, shoat or pig belonging to another, with intent thereby to steal the same or to prevent identification thereof by the true owner, is punishable by imprisonment in the State Prison for not less than one nor more than five years.

NOTE.—See Pol. Code Cal., “Marks and Brands,” Secs. 3167–3172, 3182–3185, and notes.

Frauds in
affairs of
special
partner-
ship.

358. Every member of a special partnership who commits any fraud in the affairs of the partnership, is guilty of a misdemeanor.

NOTE.—See “Special Partnership,” Civil Code Cal., Sec. 2477, et alia, and notes.

359. Every person authorized to solemnize marriage, who willfully and knowingly solemnizes any incestuous or other marriage forbidden by law, is punishable by fine of not less than one hundred nor more than one thousand dollars, or by imprisonment in the County Jail not less than three months nor more than one year, or by both.

Contracting or solemnizing incestuous or forbidden marriages.

NOTE.—What is incestuous marriage, see Civil Code Cal., Sec. 59. Who authorized to solemnize, see id., Sec. 70; see Sec. 285, ante, and note.

360. Every person authorized to solemnize any marriage, who willfully makes a false return of any marriage or pretended marriage to the Recorder, and every person who willfully makes a false record of any marriage return, is punishable as provided in the preceding section.

Making false return or record of marriage.

NOTE.—Stats. 1850, p. 424, Sec. 11. See Secs. 73, 74, 76, Civil Code Cal.

361. Every person guilty of any harsh, cruel, or unkind treatment of, or any neglect of duty towards, any idiot, lunatic, or insane person, is guilty of a misdemeanor.

Cruel treatment of lunatics, etc.

362. Every officer or person to whom a writ of habeas corpus may be directed, who, after service thereof, neglects or refuses to obey the command thereof, is guilty of a misdemeanor.

Refusing to issue or obey writ of habeas corpus.

NOTE.—Stats. 1850, p. 334, Secs. 9, 39.

363. Every person who, either solely or as member of a Court, knowingly and unlawfully recommits, imprisons, or restrains of his liberty, for the same cause, any person who has been discharged upon a writ of habeas corpus, is guilty of a misdemeanor.

Reconfining persons discharged upon writ of habeas corpus.

NOTE.—Habeas corpus Act; Stats. 1850, p. 334; Part II, Title XII, Chap. I, Sec. 1473, et seq., post. The word "unlawfully" is inserted to exclude from the

operation of the section a class of cases in which persons discharged may be rearrested or recommitted for the same offense.

Concealing
persons
entitled to
benefit of
habeas
corpus.

364. Every person having in his custody, or under his restraint or power, any person for whose relief a writ of habeas corpus has been issued, who, with the intent to elude the service of such writ or to avoid the effect thereof, transfers such person to the custody of another, or places him under the power or control of another, or conceals or changes the place of his confinement or restraint, or removes him without the jurisdiction of the Court or Judge issuing the writ, is guilty of a misdemeanor.

NOTE.—Stats. 1850, p. 334, Sec. 39. See Secs. 1473-1505, post, and notes.

Innkeepers
and
carriers
refusing
to receive
guests and
passengers.

365. Every person, and every agent or officer of any corporation carrying on business as an innkeeper, or as a common carrier of passengers, who refuses, without just cause or excuse, to receive and entertain any guest, or to receive and carry any passenger, is guilty of a misdemeanor.

NOTE.—“Common Carrier of Passengers,” Secs. 2168-2176, 2180-2191, Civil Code Cal., and notes; “Innkeepers,” id., Secs. 1859, 1860, and notes.

Counter-
feiting
quicksilver
stamps.

366. Every person who counterfeits, or who willfully uses the counterfeited seal or stamp of any person engaged in manufacturing or selling quicksilver, is guilty of a felony.

NOTE.—See notes to Secs. 349, 350, ante.

Selling
debased
quicksilver

367. Every person who willfully sells, or offers for sale as pure, any debased or adulterated quicksilver, is guilty of a misdemeanor.

NOTE.—See notes to Secs. 349, 350, ante.

TITLE X.

OF CRIMES AGAINST THE PUBLIC HEALTH AND SAFETY.

SECTION 368. Death from explosions, etc.

369. Death from collision on railroads.

370. "Public nuisances" defined.

371. Unequal damage.

372. Maintaining a nuisance, a misdemeanor.

373. Establishing or keeping pest houses within cities, towns, or villages.

374. Putting dead animals in streets, rivers, etc.

375. Keeping gunpowder, etc., unlawfully.

376. Violation of quarantine laws by masters of vessels.

377. Willful violation of health laws.

378. Neglecting to perform duties under health law.

379. Unlicensed piloting.

380. Apothecary omitting to label drugs, or labeling them wrongfully, etc.

381. Putting extraneous substances in packages of goods usually sold by weight, with intent to increase weight.

382. Adulterating food, drugs, liquors, etc.

383. Disposing of tainted food, etc.

384. Setting woods on fire.

385. Obstructing attempts to extinguish fires.

386. Maintaining bridge or ferry without authority.

387. Violating condition of undertaking to keep ferry.

388. Riding or driving faster than a walk on toll bridges.

389. Crossing toll bridges, etc., without paying toll.

390. Engineer of locomotive engine omitting to ring bell when crossing highway.

391. Intoxication of engineers, conductors, or drivers of locomotives or cars.

392. Placing passenger cars in front of freight cars.

393. Violation of duty by employes of railroad companies.

394. Exposing person infected with any contagious disease in a public place.

395. Frauds practiced to affect the market price.

396. Racing upon highways.

397. Selling liquor to Indians.

398. Selling firearms and ammunition to Indians.

399. Death from mischievous animals.

368. Every person having charge of any steam boiler or steam engine, or other apparatus for generating or employing steam, used in any manufactory, or

Death from explosions, etc.

on any railroad, or in any vessel, or in any kind of mechanical work, who willfully, or from ignorance or neglect, creates, or allows to be created, such an undue quantity of steam as to burst or break the boiler, engine, or apparatus, or to cause any other accident whereby the death of a human being is produced, is punishable by imprisonment in the State Prison for not less than one nor more than ten years.

Death from
collision on
railroads.

369. Every conductor, engineer, brakeman, switchman, or other person having charge, wholly or in part, of any railroad, car, locomotive, or train, who willfully or negligently suffers or causes the same to collide with another car, locomotive, or train, or with any other object or thing whereby the death of a human being is produced, is punishable by imprisonment in the State Prison for not less than one nor more than ten years.

"Public
nuisances"
defined.

370. Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a public nuisance.

~~navigable river, bay, stream, canal, or basin, or any public park, square, street, or highway; or,~~

4. In any way renders any considerable number of persons insecure in life or the use of property.

NOTE.—See Secs. 3479, 3480 Civil Code Cal., and notes. Difference between a public and private nuisance—one which may be abated and one for which a punishment is inflicted.—See, also, id., Secs. 3481-3484, and notes. The Civil Code, Sec. 3480, is as follows: "A public nuisance is one which affects equally the rights of the whole community or neighbor-

See
Sec 3491
Civil Code

33495
Civil Code

hood, although the extent of the damage may be unequal." The reasons for the change are chiefly: 1. That, while the definition in the Civil Code properly embraced both private and public nuisances, it is unnecessary for the purposes of the Penal Code to include private nuisances in the definition; and, 2. That the specific prohibition in other Chapters of the Code, of some Acts which have formerly been classed under the general term "public nuisance," has rendered it practicable to restrict the definition of that term, in this Code, to some extent. The following are the leading decisions which support the several clauses of the definition in the text:

Subd. 1—Rex vs. Wigg, Salk., p. 460; 2 Ld. Raym., p. 1163; Rex vs. Pierce, 2 Show., p. 327; Rex vs. Wharton, 12 Mod., p. 510; Rex vs. Smith, 1 Stra., p. 704; Rex vs. Moome, 3 Barn. & Ad., p. 184; Rex vs. White, 1 Burr., p. 333; Rex vs. Davey, 5 Esp., p. 217; Rex vs. Lloyd, 4 id., p. 200; Rex vs. Neil, 2 Carr. & P., p. 485; Putnam vs. Payne, 13 Johns., p. 312; Hinckley vs. Emerson, 4 Cow., p. 351; State vs. Baldwin, 1 Dev. & B., p. 195; Commonwealth vs. Brown, 13 Metc., p. 365; Reg. vs. Lester, 3 Jur. (N. S.), p. 570; Douglass vs. State, 4 Wisc., p. 387.

Subd. 2.—State vs. Bertheol, 6 Blackf., p. 474; State vs. Purse, 4 McCord, p. 472; Crane vs. State, 3 Ind., p. 193.

Subd. 3.—Hall's Case, Vent., p. 196; 1 Mod., p. 76; 2 Keb., p. 846; Rex vs. Leach, 6 Mod., p. 145; Id., p. 155; Rex vs. Grosvenor, 2 Stark., p. 511; Rex vs. Hollis, id., p. 536; Rex vs. Webb, 1 Ld. Raym., p. 737; Rex vs. Russell, 6 Barn. & C., p. 566; Rex vs. Trafford, 1 Barn. & Ad., p. 874; Rex vs. Watts, 2 Esp., p. 675; Rex vs. Tyndall, 1 Nev. & P., p. 719; 6 Ad. & E., p. 143; W. W. & D., p. 316; Rex vs. Ward, 4 Ad. & E., p. 384; 1 Har. & W., p. 703; Rex vs. Pease, 4 Barn. & Ad., p. 30; Rex vs. Morris, 1 Barn. & Ad., p. 441; Reg. vs. Botfield, 1 Car. & M., p. 151; Rex vs. Smith, 4 Esp., p. 109; Rex vs. Canfield, 6 Esp., p. 136; Rex vs. Sarmon, 1 Burr., p. 516; Rex vs. Cross, 3 Camp., p. 224; Rex vs. Russel, 6 East, p. 427; 2 Smith, p. 424; Rex vs. Jones, 3 Camp., p. 230; Rex vs. Carlile, 6 Car. & P., p. 637; Rex vs. Gregory, 2 Nev. & M., p. 478; 5 Barn. & Ad., p. 555; Reg. vs. Scott, 2 Gale & D., p. 729; 3 Ad. & E. (N. S.), p. 543; 3 Railw. Cas., p. 187; Reg. vs. Betts, 22 Eng. L. & Eq., p. 240; People vs. Lawson, 17 Johns., p. 276; People vs. Cunningham, 1 Den., p. 524; Renwick vs. Morris, 7 Hill, p. 575; Harlon vs. Humiston, 6 Cow.,

p. 189; *Lansing vs. Smith*, 8 id., p. 146; *Dygert vs. Schenck*, 23 Wend., p. 446; *Drake vs. Rogers*, 3 Hill, p. 604; *People vs. Lambier*, 5 Den., p. 9; *Moshier vs. Utica and Schenectady R. R. Co.*, 8 Barb., p. 427; *Hart vs. Mayor, etc., of Albany*, 9 Wend., p. 571; *Hecker vs. N. Y. Balance Dry Dock Co.*, 13 How. Pr., p. 549; and see same vs. same, 24 Barb., p. 215; *Peckham vs. Henderson*, 27 Barb., p. 207; *People vs. Vanderbilt*, 24 How. Pr., p. 301; *Whetmore vs. Atlantic White Lead Co.*, 37 Barb., p. 70; *Commonwealth vs. Wright*, Thach. Cr. Cas., p. 211; *Commonwealth vs. Gowen*, 7 Mass., p. 378; *State vs. Spainhour*, 2 Dev. & B., p. 547; *Commonwealth vs. Tucker*, 2 Pick., p. 44; *Commonwealth vs. Webb*, 6 Rand., p. 726; *State vs. Godfrey*, 3 Fairf., p. 361; *Commonwealth vs. Ruggles*, 10 Mass., p. 891; *State vs. Mobley*, 1 McMullen, p. 44; *State vs. Brown*, 16 Conn., p. 54; *Elkies vs. State*, 2 Humph., p. 543; *Simpson vs. State*, 10 Yerg., p. 525; *State vs. Miskimins*, 2 Carter, p. 440; *Commonwealth vs. Rush*, 14 Penn. St., p. 186; *State vs. Morris and Essex R. R. Co.*, 3 Zab., p. 360; *Commonwealth vs. Bowman*, 3 Barr., p. 202; *Commonwealth vs. Milliman*, 13 Serg. & R., p. 403; *Commonwealth vs. Chapin*, 5 Pick., p. 199; *State vs. Hunter*, 5 Ired., p. 369; *State vs. Commissioners*, 3 Hill, S. C., p. 149; *State vs. Yarrell*, 12 Ired., p. 130; *State vs. Duncan*, 1 McCord, p. 404; *State vs. Thompson*, 2 Strobb., p. 12; *Commonwealth vs. Elburger*, 1 Whart., p. 469; *State vs. Atkinson*, 24 Vt., p. 448; *Newark Plankroad Co. vs. Elmer*, Stroct., p. 754; *Attorney Gen. vs. H. R. R. R. Co.*, id., p. 526; *Works vs. Junction R. R. Co.*, 5 McLean, p. 425; *State vs. Phipps*, 4 Ind., p. 515; *State vs. Freeport*, 43 Me., p. 193.

Subd. 4.—*Rex vs. White, Burr.*, p. 333; *Rex vs. Smith, Stra.*, p. 703; *White vs. Cohen*, 19 Eng. L. & Eq., p. 146; *Catlin vs. Valentine*, 9 Paige, p. 575; *Brady vs. Weeks*, 3 Barb., p. 157; *Prescott's Case*, 2 City Hall Rec., p. 161; *Prout's Case*, 4 id., p. 481; *Lynck's Case*, 6 id., p. 61; *People vs. Townsend*, 3 Hill, p. 479; *Hackney vs. State*, 8 Ind., p. 494; *State vs. Wetherall*, 5 Harring., p. 487; 3 Blackst. Comm., p. 216; *Bell's Sc. Law Dict.*, Tit. "Nuisance."

The following are intended to be excluded from the definition, because they have been decided not to be nuisances upon grounds deemed to be sufficient: Exercising banking privileges without authority.—*Att'y Gen. vs. Bank of Niagara, Hopk.*, p. 354. An immigrant depot, if not kept in an improper manner.—*Phoenix vs. Commissioners of Emigration*, 1 Abbott's

Pr., p. 466. A person sick of a contagious disease, if not needlessly exposed so as to endanger the public.—*Boom vs. City of Utica*, 2 Barb., p. 104. Several offenses which in this Code are made the subject of specific provisions have been held indictable under the common law definition of nuisance. See *Rex vs. Meadley*, 8 Carr. & P., p. 292. As to obstructing railways.—*Reg. vs. Holroyd*, 2 M. & Rob., p. 339. As to keeping gunpowder.—*Rex vs. Taylor*, 2 Stra., p. 1167; *People vs. Sands*, 1 Johns., p. 78; *Myers vs. Malcolm*, 6 Hill, p. 292. As to establishments for gaming and other useless sports.—*Tanner vs. Trustees of Albion*, 5 Hill, p. 121; *Updike vs. Campbell*, 4 E. D. Smith, p. 570; *State vs. Doon*, R. M. Charl., p. 1; *State vs. Haines*, 30 Maine, p. 65. As to other disorderly houses.—*Smith vs. Commonwealth*, 6 B. Monr., p. 21; *Bloomhuff vs. State*, 8 Blackf., p. 205; *State vs. Bailey*, 1 Fost., p. 343; *Rex vs. Williams*, 1 Salk., p. 384; *Hackney vs. State*, 8 Ind., p. 494. As to dangerous driving through public streets.—*U. S. vs. Hart*, Pet. C. C., p. 390. As to exposure of the person.—*Reg. vs. Webb*, 1 Den. C. C. R., p. 338; 13 Jur., p. 42; 18 Law J., M. C., p. 39. As to digging up or injuring highways.—*Reg. vs. Sheffield Gas Consumers' Co.*, 22 Eng. L. & Eq., p. 200; *State vs. Peekhard*, 5 Harring., p. 500. As to neglect to keep ferry in repair.—*State vs. Willis*, Busb., p. 223. And the like.—*State vs. Graham*, 3 Sneed., p. 134. Consult, also, upon other branches of the criminal law relative to what are nuisances, the following: *Rex vs. Wigg*, 1 Ld. Raym., p. 737; *Rex vs. Village of Hornsey*, 1 Ro., p. 406; *Anon.*, 12 Mod., p. 342; *Rex vs. Record*, 2 Show., p. 216; *Rex vs. Dunraven*, W. W. & D., p. 577; *Rex vs. Cross*, 2 Carr. & P., p. 483; *Rex vs. Neville*, Peake, p. 93; *Rex vs. Watts*, Mood. & M., p. 281; *Wetmore vs. Tracy*, 14 Wend., p. 250; *Harris vs. Thompson*, 9 Barb., p. 350; *Plant vs. Long Island R. R. Co.*, 10 id., p. 26; *Leigh vs. Westervelt*, 2 Duer, p. 618; *Williams vs. N. Y. Central R. R. Co.*, 18 Barb., p. 222; *Lynch's Case*, 6 City Hall Rec., p. 61; *Dygert vs. Schenck*, 23 Wend., p. 446; *People vs. Cunningham*, 1 Den., p. 424; *Renwick vs. Morris*, 7 Hill, p. 575; *Peckham vs. Henderson*, 27 Barb., p. 207; *State vs. Commissioners*, Riley, p. 146; *Ellis vs. State*, 7 Blackf., p. 534; *Works vs. Junction R. R.*, 5 McLean, p. 425; *Douglass vs. State*, 4 Wisc, p. 387; *Commonwealth vs. Upton*, 6 Gray, p. 473.

Unequal
damage.

371. An act which affects an entire community or neighborhood, or any considerably number of persons, as specified in the last section, is not less a nuisance because the extent of the annoyance or damage inflicted upon individuals is unequal.

Maintain-
ing a
nuisance,
a misde-
meanor.

372. Every person who maintains or commits any public nuisance, the punishment for which is not otherwise prescribed, or who willfully omits to perform any legal duty relating to the removal of a public nuisance, is guilty of a misdemeanor.

Establish-
ing or
keeping
pest houses
within
cities,
towns, or
villages.

373. Every person who establishes or keeps, or causes to be established or kept, within the limits of any city, town, or village, any pest house, hospital, or place for persons affected with contagious or infectious diseases, is guilty of a misdemeanor.

NOTE.—Stats. 1853, p. 35, Secs. 1, 2.

Putting
dead
animals in
streets,
rivers, etc.

374. Every person who puts the carcass of any dead animal, or the offal from any slaughter pen, corral, or butcher shop, into any river, creek, pond, street, alley, public highway or road in common use, or who attempts to destroy the same by fire within one fourth of a mile of any city, town, or village, is guilty of a misdemeanor.

NOTE.—Stats. 1852, p. 100, Sec. 1.

Keeping
gunpow-
der, etc.,
unlawfully.

375. Every person who makes or keeps gunpowder, nitro-glycerine, or other highly explosive substance, within any city or town, or who carries the same through the streets thereof, in any quantity or manner such as is prohibited by law, or by any ordinance of such city or town, is guilty of a misdemeanor.

Violation
of quaran-
tine laws
by masters
of vessels.

376. Every master of a vessel subject to quarantine or visitation by the Health Officer, arriving in the port of San Francisco, who refuses or omits:

1. To proceed with and anchor his vessel at the place assigned for quarantine, at the time of his arrival; or,

2. To submit his vessel, cargo, and passengers to the examination of the Health Officer, and to furnish all necessary information to enable that officer to determine to what length of quarantine and other regulations they ought, respectively, to be subject; or,

3. To remain with his vessel at quarantine during the period assigned for her quarantine, and while at quarantine to comply with the regulations prescribed by law, and with such as any of the officers of health, by virtue of authority given them by law, shall prescribe in relation to his vessel, his cargo, himself, his passengers, or crew;

—Is punishable by imprisonment in the County Jail not exceeding one year, or by fine not exceeding two thousand dollars, or both.

NOTE.—See Political Code Cal., Secs. 3004-3032. Shipmasters' duties, id., Secs. 3013, 3014, 3017-3019.

377. Every person who willfully violates any of the laws of this State relating to the preservation of the public health, is, unless a different punishment for such violation is prescribed by this Code, punishable by imprisonment in the County Jail not exceeding one year, or by fine not exceeding one thousand dollars, or both.

Willful
violation
of health
laws.

NOTE.—See references in note to Sec. 376, ante; also, "Preservation of public health," Chap. II, Title VII, Part III, Political Code Cal., Secs. 2978-3063, and notes, inclusive.

378. Every person charged with the performance of any duty under the laws of this State relating to the preservation of the public health, who willfully neglects or refuses to perform the same, is guilty of a misdemeanor.

Neglecting
to perform
duties
under
health law.

NOTE.—See Secs. 2978-3063, inclusive, Pol. Code Cal.

Unlicensed
piloting.

379. Every person, not the master or owner, or not authorized to act as pilot under the laws of this State, who pilots or offers to pilot any vessel to or from any port of this State for which there are commissioned or licensed pilots, or who pilots or offers to pilot any vessel to or from any port other than that for which he is commissioned or licensed, and for which there are pilots so commissioned or licensed, is guilty of a misdemeanor.

NOTE.—Founded upon Stats. 1869-70, p. 348, Sec. 17. That Act applies only to the port of San Francisco, but for the same reasons should be extended to all ports in this State having commissioned pilots. See "Pilots and Pilot Regulations," generally, Secs. 2429-2447; San Francisco, etc., id., Secs. 2457-2468; Humboldt Bay, etc., id., Secs. 2476-2491; and San Diego, Stats. 1871-2, pp. 650-652, Pol. Code Cal., note to Sec. 2491.

Apothecary
omitting to
label drugs,
or labeling
them
wrongfully,
etc.

380. Every apothecary, druggist, or person carrying on business as a dealer in drugs or medicines, or person employed as clerk or salesman by such person, who, in putting up any drugs or medicines, or making up any prescription, or filling any order for drugs or medicines, willfully, negligently, or ignorantly omits to label the same, or puts an untrue label, stamp, or other designation of contents, upon any box, bottle, or other package containing any drugs or medicines, or substitutes a different article for any article prescribed or ordered, or puts up a greater or less quantity of any article than that prescribed or ordered, or otherwise deviates from the terms of the prescription or order which he undertakes to follow, in consequence of which human life or health is endangered, is guilty of a misdemeanor, or if death ensues, is guilty of a felony.

NOTE.—The frequent occurrence of accidents, involving, often, even the loss of human life, through mistakes in the putting up of prescriptions, render necessary some legislation to enforce care and caution on the part of dealers in drugs. The recent case of *Thomas vs. Winchester*, 2 Seld., p. 397, illustrates the danger arising in a different class of cases also embraced in the

text of this section, viz.: cases in which a manufacturer or dealer in drugs sends them into the market under an untrue label; in consequence of which, retail dealers are innocently led to supply dangerous articles without intending it. In that case it appeared that defendants, who were manufacturing druggists, sold to a dealer a jar labeled, "Extract of dandelion," but which really contained extract of belladonna. The dealer, relying on the label, sold the jar to a retailer; and the latter, in turn, used a part of the contents of the jar, supposing them to be extract of dandelion, in putting up a prescription in which that article was required. A dangerous illness was the result to the person taking the prescription. The Court of Appeals, in the case cited, held the manufacturers liable in damages to the injured person, notwithstanding the article had passed through intermediate sales, in reaching such person. This liability is founded upon the duty which the law imposes upon the dealer, to avoid acts dangerous to other persons; and not upon any contract or privity between him and the consumer. Obvious considerations make it proper that this duty should be enforced by criminal penalty as by a remedy in damages.—See Civil Code Cal., Secs. 1708, 3333, 3523—wrongs and

381. Every person who, in putting up in any bag, bale, box, barrel, or other package, any hops, cotton, wool, grain, hay, or other goods usually sold in bags, bales, boxes, barrels, or packages by weight, puts in or conceals therein anything whatever, for the purpose of increasing the weight of such bag, bale, box, barrel or package, with intent thereby to sell the goods therein, or to enable another to sell the same, for an increased weight, is punishable by fine of not less than twenty-five dollars for each offense.

Putting
extraneous
substances
in packages
of goods
usually
sold by
weight,
with intent
to increase
weight.

382. Every person who adulterates or dilutes any article of food, drink, drug, medicine, spirituous or malt liquor, or wine, or any article useful in compounding them, with a fraudulent intent to offer the same or cause or permit it to be offered for sale as unadulterated or undiluted, and every person who fraudulently sells, or keeps or offers for sale the same, as unadulterated or undiluted, is guilty of a misdemeanor.

321

Adulterat-
ing food,
drugs,
liquors, etc.

NOTE.—This and the succeeding section is based upon Sec. 125 of the Crimes and Punishment Act (Stats. 1850, p. 229), and upon the Acts to prevent the adulteration of food, milk, etc.—Stats. 1860, p. 186; 1862, p. 484; 1870, p. 298. The section follows the language of the New York Penal Code, Secs. 451, 452.

Disposing
of tainted
food, etc.

383. Every person who knowingly sells, or keeps or offers for sale, or otherwise disposes of any article of food, drink, drug, or medicine, knowing that the same has become tainted, decayed, spoiled, or otherwise unwholesome or unfit to be eaten or drank, with intent to permit the same to be eaten or drank, is guilty of a misdemeanor.

Setting
woods on
fire.

384. Every person who willfully or negligently sets on fire, or causes or procures to be set on fire, any woods, prairies, grasses, or grain, on any lands, is guilty of a misdemeanor.

NOTE.—Stats. 1852, p. 111, Sec. 1.

Stats. 1871-2, p. 96.

An Act to prevent the destruction of forests by fire on public lands.

[Approved February 13, 1872.]

[Enacting clause.]

SECTION 1. Any person or persons who shall willfully and deliberately set fire to any wooded country or forest belonging to this State or the United States, within this State, or to any place from which fire shall be communicated to any such wooded country or forest, or who shall accidentally set fire to any such wooded country or forest, or to any place from which fire shall be communicated to any such wooded country or forest, and shall not extinguish the same, or use every effort to that end, or who shall build any fire, for lawful purpose or otherwise, in or near any such wooded country or forest, and through carelessness or neglect shall permit said fire to extend to and burn through such wooded country or forest, shall be deemed guilty of a misdemeanor, and on conviction, before a Court of competent jurisdiction, shall be punishable by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or by both such fine and imprisonment; *provided*, that nothing herein contained shall apply to any person who in

good faith shall set a back fire to prevent the extension of a fire already burning. All fines collected under this Act shall be paid into the County Treasury for the benefit of the Common School Fund of the county in which they are collected.

The Act of 1872, p. 895, providing a punishment for burning other houses and property, is void under Sec. 330, Political Code, it being amendatory of an Act repealed by this Code. It is amply provided for under "Arson" and "Malicious mischief," post.

385. Every person who, at the burning of a building, disobeys the lawful orders of any public officer or fireman, or offers any resistance to or interference with the lawful efforts of any fireman or company of firemen to extinguish the same, or engages in any disorderly conduct calculated to prevent the same from being extinguished, or who forbids, prevents, or dissuades others from assisting to extinguish the same, is guilty of a misdemeanor.

Obstructing attempts to extinguish fires.

NOTE.—See "Fires and Firemen," Political Code Cal., Secs. 3335-3345, and notes.

386. Every person who demands or receives compensation for the use of any bridge or ferry, or sets up or keeps any road, bridge, ferry, or constructed ford for the purpose of receiving any remuneration for the use of the same, without authority of law, is guilty of a misdemeanor.

Maintaining bridge or ferry without authority.

NOTE.—See Political Code, Index, Titles "Bridges," "Ferries," etc.

387. Every person who, having entered into an undertaking to keep and attend a ferry, violates the conditions of such undertaking, is guilty of a misdemeanor.

Violating condition of undertaking to keep ferry.

NOTE.—See Political Code Cal., Secs. 2850, 2894, et alia.

388. Every person who willfully rides or drives faster than a walk on or over any toll bridge, law-

Riding or driving faster than a walk on toll bridges

fully licensed, is punishable by fine not exceeding twenty dollars.

NOTE.—Stats. 1861, p. 18, Sec. 1.

389. Every person not exempt from paying tolls, who crosses on any ferry or toll bridge, or passes through any toll gate, lawfully kept, without paying the toll therefor, and with intent to avoid such payment, is punishable by fine not exceeding twenty dollars.

NOTE.—Stats. 1861, p. 18, Sec. 2.

Engineer of locomotive engine omitting to ring bell when crossing highway.

390. Every person in charge of a locomotive engine who, before crossing any traveled public way, omits to cause a bell to ring or steam whistle to sound at the distance of at least eighty rods from the crossing, and up to it, is guilty of a misdemeanor.

NOTE.—See "Regulations of Trains," Civil Code Cal., Sec. 486.

Intoxication of engineers, conductors, or drivers of locomotives or cars.

391. Every person who is intoxicated while in charge of a locomotive engine, or while acting as conductor or driver upon any railroad train or car, whether propelled by steam or drawn by horses, or while acting as train dispatcher or as telegraph operator, receiving or transmitting dispatches in relation to the movement of trains, is guilty of a misdemeanor.

NOTE.—See Political Code Cal., Secs. 2920-2933. This section was amended so as to read as published in the text, by Act of April 1st, 1872: "An Act to amend and in relation to the Political, Civil, and Penal Codes, and the Code of Civil Procedure," now on file in the office of the Secretary of State.

Placing passenger cars in front of freight cars.

392. Every person who, in making up or running railroad trains, places or runs, or causes to be placed or run, any freight car in the rear of passenger cars, is guilty of a misdemeanor, and if loss of life or limb results from such placing or running, is guilty of felony. The term "freight car," as used in this section, does not include a baggage, express, or mail car.

Polit. Code
2814
Crossing bridge, etc., without paying toll.

NOTE.—This section was amended so as to read as published in the text, by Act of April 1st, 1872: "An Act to amend and in relation to the Political, Civil, and Penal Codes, and the Code of Civil Procedure," now on file in the office of the Secretary of State.

393. Every engineer, conductor, brakeman, switch-tender, or other officer, agent, or servant of any railroad company, who is guilty of any willful violation or omission of his duty as such officer, agent, or servant, whereby human life or safety is endangered, the punishment of which is not otherwise prescribed, is guilty of a misdemeanor.

Violation of duty by employes of railroad companies.

394. Every person who willfully exposes himself or another afflicted with any contagious or infectious disease, in any public place or thoroughfare, except in his necessary removal in a manner the least dangerous to the public health, is guilty of a misdemeanor.

Exposing person infected with any contagious disease in a public place.

395. Every person who willfully makes or publishes any false statement, spreads any false rumor, or employs any other false or fraudulent means or device, with intent to affect the market price of any kind of property, is guilty of a misdemeanor.

Frauds practiced to affect the market price.

396. Every person driving any conveyance drawn by horses, upon any public road or way, who causes or suffers his horses to run, with intent to pass another conveyance, or to prevent such other from passing his own, is guilty of a misdemeanor.

Racing upon highways.

397. Every person who sells or furnishes, or causes to be sold or furnished, intoxicating liquors to any Indian, is guilty of a misdemeanor.

Selling liquor to Indians.

NOTE.—Stats. 1850, p. 408, Sec. 15; 1855, p. 179, Sec. 2.

104

Stats. 1871-2, p. 231.

An Act to prevent the sale of intoxicating drinks to minors.

[Approved March 4, 1872.]

[Enacting clause.]

SECTION 1. Every person who sells or gives to another under the age of sixteen years, to be by him drank at the time as a beverage, any intoxicating drink, is guilty of a misdemeanor, and punishable by a fine not exceeding one hundred dollars, or by imprisonment in the County Jail not exceeding three months; *provided*, that nothing in this Act shall be deemed to apply to parents of such children or guardians of their wards or physicians.

Selling
firearms
and ammu-
nition to
Indians.

398. Every person who sells or furnishes to any Indian any firearm, or ammunition therefor, is guilty of a misdemeanor.

NOTE.—Stats. 1854, p. 15.

Death from
mischiev-
ous animals

399. If the owner of a mischievous animal, knowing its propensities, willfully suffers it to go at large, or keeps it without ordinary care, and such animal, while so at large, or while not kept with ordinary care, kills any human being who has taken all the precautions which the circumstances permitted, or which a reasonable person would ordinarily take in the same situation, is guilty of a felony.

400. Every person exhibiting the deformities, for hire, is guilty of a misdemeanor; and every person who shall by any means go to any person the appearance of a deformity, and shall exhibit such person for hire, is guilty of a misdemeanor. [Approved February 1874.]

400. Every person who deliberately aids or advises, or encourages, another to commit suicide, is guilty of a felony.

XI.

THE PUBLIC PEACE.

meetings, other than religious or

defined

408. Punishment of rioters in unlawful assembly.

409. Remaining present at place of riot, etc., after warning to disperse.

401 New Section

\$400
\$100

SECTION 410. Magistrates neglecting or refusing to disperse rioters.

411. Consequence of resisting process after a county has been declared in a state of insurrection.

412. Prize fights.

413. Persons present at prize fights.

414. Leaving the State to engage in prize fights.

415. Disturbing the peace in night time.

416. Refusing to disperse upon lawful command.

417. Exhibiting deadly weapon in rude, etc., manner, or using the same unlawfully.

418. Forcible entry and detainer.

419. Returning to take possession of lands after being removed by legal proceedings.

403. Every person who, without authority of law, willfully disturbs or breaks up any assembly or meeting, not unlawful in its character, other than such as is mentioned in Sections 59 and 302, is guilty of a misdemeanor.

Disturb-
ance of
public
meetings,
other than
religious
or political.

NOTE.—The assembly specified in Sec. 59 is a meeting of electors, held for the discussion of public questions, and that in Sec. 302 a religious meeting. This section includes funerals, and like lawful meetings, and corresponds with the N. Y. Penal Code, Sec. 473.

404. Any use of force or violence, disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot.

"Riot"
defined.

NOTE.—Stats. 1855, p. 105; consult N. Y. P. C., Sec. 414; State vs. Conolly, 3 Rich., p. 337; State vs. Snow, 6 Shep., p. 346; Dougherty vs. People, 4 Scamm., p. 180; Rex vs. Langford, 1 Car. & M., p. 604; State vs. Cole, 2 McCord, p. 117; State vs. Brooks, 1 Hill, S. C., p. 361; State vs. Brazil, 1 Rice, p. 258; 4 Black. Com., p. 146; 4 Burns Just., Title "Riot;" Bouv. Law. Dict., id; 1 Hawk. P. C., Chap. 65, Sec. 1; Whart. Cr. L., p. 722; Chitty's Cr. L., p. 274; see common law definition, Bouv. Law. Dict., Title "Riot," where the distinction between the two will be apparent.

405. Every person who participates in any riot is punishable by imprisonment in the County Jail not

Riot, pun-
ishment of

exceeding two years, or by fine not exceeding two thousand dollars, or both.

NOTE.—The punishment affixed to riot (Stats. 1855, p. 105, Sec. 3) was the same as that affixed to rout, though the former offense included and was an aggravation of the latter. The Code has increased the maximum of the term from six months to two years, and the maximum of the fine from five hundred dollars to two thousand dollars, and has affixed to the crime of rout the same punishment as heretofore prescribed by law.—See Russ. on Crimes, p. 247; 4 Black. Com., p. 146; Roscoe Cr. Ev., Index.

"Rout"
defined.

406. (§ 116.) Whenever two or more persons, assembled and acting together, make any attempt or advance toward the commission of an act which would be a riot if actually committed, such assembly is a rout.

NOTE.—Stats. 1855, p. 105, Sec. 3. This corresponds with the common law definition, but the riot which would ensue, if the intended enterprise were carried into execution, is the riot defined in Sec. 404, ante, and not the common law riot. A rout is an unexecuted intended riot.—Russ. on Crimes, p. 253; 4 Blackst. Com., p. 140.

"Unlawful
assembly"
defined.

407. (§ 115.) Whenever two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly.

NOTE.—Stats. 1855, p. 105, Sec. 3. See definition of Bouv. Law Dict., Title "Unlawful Assembly;" 4 Bl. Com., p. 140; Russ. on Cr., p. 254. Consult, upon the first branch of this section, 4 Bl. Comm., p. 147; Rex vs. Birt, 5 Carr. & P., p. 154; Rex vs. Heass, 2 Salk., p. 594. Upon the second, 1 Hawk. P. C., Chap. 65, Sec. 9; 1 Russ. Cr., p. 272; Whart. Cr. L., p. 722; Rex vs. Hunt, 1 Russ. C. & M., p. 254; 3 Cox Cr. Cas., p. 215; Reg. vs. Vincent, 9 Carr. & P., p. 91; Reg. vs. Neale, 9 Carr. & P., p. 431; Reg. vs. Soley, 11 Mod., p. 116; Gagarty vs. Queen, 3 Cox Cr. Cas., p. 306.

408. (§§ 115, 116.) Every person who participates in any rout or unlawful assembly is guilty of a misdemeanor.

Punishment of rout and unlawful assembly.

NOTE.—Stats. 1855, p. 105, Sec. 3.

409. Every person remaining present at the place of any riot, rout, or unlawful assembly, after the same has been lawfully warned to disperse, except public officers and persons assisting them in attempting to disperse the same, is guilty of a misdemeanor.

Remaining present at place of riot, etc., after warning to disperse.

410. If a magistrate or officer, having notice of an unlawful or riotous assembly, mentioned in this Chapter, neglects to proceed to the place of assembly, or as near thereto as he can with safety, and to exercise the authority with which he is invested for suppressing the same and arresting the offenders, he is guilty of a misdemeanor.

Magistrates neglecting or refusing to disperse rioters.

NOTE.—Stats. 1861, p. 216, Sec. 43. The words "riotous" and "riotously," *ex vi termini*, imply violence.—2 Sess. Cas., p. 13; 2 Str., p. 834; Chit. Cr. Law, p. 489.

411. A person who, after the publication of the proclamation authorized by Section 732, resists or aids in resisting the execution of process in any county declared to be in a state of insurrection, or who aids or attempts the rescue or escape of another from lawful custody or confinement, or who resists or aids in resisting any force ordered out by the Governor to quell or suppress an insurrection, is punishable by imprisonment in the State Prison not less than two years.

Consequence of resisting process after a county has been declared in a state of insurrection.

NOTE.—Stats. 1851, p. 212, Sec. 50.

412. (§ 44.) Every person who engages in, instigates, encourages, or promotes any ring or prize fight, or any other premeditated fight or contention (without deadly weapons), either as principal, aid, second, umpire, surgeon, or otherwise, is punishable by im-

Prize fights.

prisonment in the State Prison not exceeding two years.

Persons
present at
prize fights.

413. (§ 44.) Every person willfully present as a spectator at any fight or contention mentioned in the preceding section, is guilty of a misdemeanor.

NOTE.—Stats. 1851, p. 216.

Leaving
the State to
engage in
prize fights.

414. Every person who leaves this State with intent to evade any of the provisions of the last two sections, and to commit any act out of this State such as is prohibited by them, and who does any act which would be punishable under these provisions if committed within this State, is punishable in the same manner as he would have been in case such act had been committed within this State.

NOTE.—This corresponds with Sec. 231, ante—leaving the State to fight a duel—each being so framed that proof of *any act* in aid of a duel, or of a ring or prize fight, is sufficient to convict.

Disturbing
the peace
in night
time.

415. (§ 112.) Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood, family, or person, by loud or unusual noise, or by tumultuous or offensive conduct, or by threatening, traducing, quarrelling, challenging to fight, or fighting, is punishable by fine not exceeding two hundred dollars, or by imprisonment in the County Jail not exceeding two months.

NOTE.—Stats. 1850, p. 243. See construction of term “maliciously,” Sec. 7, Subd. 4, ante, and “willfully,” id., Subd. 1.

Refusing
to disperse
upon lawful
command.

416. (§ 113.) If two or more persons assemble for the purpose of disturbing the public peace, or committing any unlawful act, and do not disperse on being desired or commanded so to do by a public officer, the persons so offending are severally guilty of a misdemeanor.

NOTE.—Stats. 1850, p. 243.

417. Every person who, not in necessary self-defense, in the presence of two or more persons, draws or exhibits any deadly weapon in a rude, angry, and threatening manner, or who, in any manner, unlawfully uses the same, in any fight or quarrel, is guilty of a misdemeanor.

Exhibiting
deadly
weapon in
rude, etc.,
manner,
or using
the same
unlawfully.

NOTE.—Stats. 1855, p. 268, Sec. 1. .

418. Every person using or procuring, encouraging or assisting another to use, any force or violence in entering upon or detaining any lands or other possessions of another, except in the cases and in the manner allowed by law, is guilty of a misdemeanor.

Forcible
entry and
detainer.

NOTE.—See “Forcible Entry and Detainer,” Code Civil Procedure, Secs. 1159–1175, and notes.

419. Every person who has been removed from any lands by process of law, or who has removed from any lands pursuant to the lawful adjudication or direction of any Court, tribunal, or officer, and who afterwards unlawfully returns to settle, reside upon, or take possession of such lands, is guilty of a misdemeanor.

Returning
to take
possession
of lands
after being
removed
by legal
proceed-
ings.

NOTE.—This section is founded upon and to carry out the spirit of an Act for the punishment of contempts and trespass (Stats. 1862, p. 115), and is similar to N. Y. Pol. Code, Sec. 493.

420 New Section added
Section 420 Repealed 1/1/80

TITLE XII.

OF CRIMES AGAINST THE REVENUE AND PROPERTY OF THIS STATE.

SECTION 424. Embezzlement and falsification of accounts by public officers.

425. Officers neglecting to pay over public moneys.

426. “Public moneys,” as used in the preceding section, defined.

427. Failure to pay over fines and forfeitures received, a misdemeanor.

428. Obstructing officer in collecting revenue.

SECTION 429. Refusing to give Assessor list of property, or giving false name.

430. Making false statements, not under oath, in reference to taxes.

431. Delivering receipts for poll taxes, other than prescribed by law, or collecting poll taxes, etc., without giving the receipt prescribed by law.

432. Having blank receipts for licenses, etc., other than those prescribed by law.

433. *Repealed.*

434. Refusing to give name of persons in employment, etc.

435. Carrying on business without license.

436. Unlawfully acting as auctioneer.

437. *Repealed.*

438. *Repealed.*

439. Effecting insurance on account of foreign companies that have not complied with the laws of this State.

440. Officer charged with collection, etc., of revenue, refusing to permit inspection of his books.

441. Board of Examiners, Controller, and Treasurer neglecting certain duties.

442. Having State arms, etc.

443. Selling State arms, etc.

Embezzlement and falsification of accounts by public officers.

424. (§§ 66, 67.) Every officer of this State, or of any county, city, town, or district of this State, and every other person charged with the receipt, safe keeping, transfer, or disbursement of public moneys, who either:

1. Without authority of law, appropriates the same or any portion thereof to his own use, or to the use of another; or,

2. Loans the same or any portion thereof; or, *

3. Fails to keep the same in his possession until disbursed or paid out by authority of law; or,

4. Unlawfully deposits the same or any portion thereof in any bank, or with any banker or other person; or,

5. Changes or converts any portion thereof from coin into currency, or from currency into coin or other currency, without authority of law; or,

6. Knowingly keeps any false account, or makes any

false entry or erasure in any account of or relating to ~~the same~~ the same; or,

7. Fraudulently alters, falsifies, conceals, destroys, or obliterates any such account; or,

8. Willfully refuses or omits to pay over, on demand, any public moneys in his hands, upon the presentation of a draft, order, or warrant drawn upon such moneys by competent authority; or,

9. Willfully omits to transfer the same, when such transfer is required by law; or,

10. Willfully omits or refuses to pay over to any officer or person authorized by law to receive the same, any money received by him under any duty imposed by law so to pay over the same;

—Is punishable by imprisonment in the State Prison for not less than one nor more than ten years, and is disqualified from holding any office in this State.

NOTE.—This section was amended so as to read as published in the text, by Act of April 1st, 1872, cited in note to Sec. 391, ante. It is founded upon the following laws: Secs. 66 and 67 of the Crimes and Punishment Act.—Stats. 1850, p. 229. An Act to punish embezzlement of the public money.—Stats. 1851, p. 425. An Act for the protection of the Treasury.—Stats. 1863, p. 97. See kindred provisions in Political Code, Secs. 920-926; see, also, Sec. 71, ante. These provisions are peculiarly and especially applicable to the collection, safe keeping, and disbursement of the public revenue. See Sec. 3746, et seq., Political Code; also, id., Titles "Licenses," and "County Officers."

425. Every officer charged with the receipt, safe keeping, or disbursement of public moneys, who neglects or fails to keep and pay over the same in the manner prescribed by law, is guilty of felony.

Officers neglecting to pay over public moneys.

NOTE.—For the manner in which the various officers are required to keep and disburse public moneys, see Political Code Cal., Index, "Treasurer, State," "County," "Revenue," "Collector," "Licenses," "Auditor," etc.

"Public moneys," as used in the preceding section, defined.

426. The phrase "public moneys," as used in the two preceding sections, includes all bonds and evidence of indebtedness, and all moneys belonging to the State, or any city, county, town, or district therein, and all moneys, bonds, and evidences of indebtedness received or held by State, county, district, city, or town officers in their official capacity.

Failure to pay over fines and forfeitures received, a misdemeanor.

427. If any Clerk, Justice of the Peace, Sheriff, or Constable, who receives any fine or forfeiture, refuses or neglects to pay over the same according to law and within thirty days after the receipt thereof, he is guilty of a misdemeanor.

NOTE.—Stats. 1851, p. 212, Sec. 680. See Secs. 1457, 1570, post.

Obstructing officer in collecting revenue

428. Every person who willfully obstructs or hinders any public officer from collecting any revenue, taxes, or other sums of money in which the people of this State are interested, and which such officer is by law empowered to collect, is guilty of a misdemeanor.

Refusing to give Assessor list of property, or giving false name.

429. Every person who unlawfully refuses, upon demand, to give to any County Assessor a list of his property subject to taxation, or to swear to such list, or who gives a false name or fraudulently refuses to give his true name to any Assessor, when demanded by such Assessor in the discharge of his official duties, is guilty of a misdemeanor.

NOTE.—Stats. 1861, p. 419, Secs. 17, 18. See Secs. 3629–3631, Political Code Cal.

Making false statements, not under oath, in reference to taxes.

430. Every person who, in making any statement, not upon oath, oral or written, which is required or authorized by law to be made, as the basis of imposing any tax or assessment, or of an application to reduce any tax or assessment, willfully states anything which he knows to be false, is guilty of a misdemeanor.

NOTE.—Stats. 1861, p. 419, Secs. 17, 18, 68; Stats. Geo. III, Chap. 105, Sec. 9. False statements made under the sanction of an oath, in any of the cases referred to in the section above, fall within the definition of perjury, as given in this Code, and are therefore excluded from the operation of this section.—See N. Y. P. C., Sec. 520; see, also, Secs. 3629–3631, 3674, 3675, and notes, Political Code Cal.

431. Every person who uses or gives any receipt, except that prescribed by law, as evidence of the payment of any poll tax, road tax, or license of any kind, or who receives payment of such tax or license without delivering the receipt prescribed by law, or who inserts the name of more than one person therein, is guilty of a misdemeanor.

Delivering receipts for poll taxes, other than prescribed by law, or collecting poll taxes, etc., without giving the receipt prescribed by law.

NOTE.—Stats. 1861, p. 419, Sec. 95. This and the nine following sections are extended to cover the several provisions of the revenue law relating to tax receipts, licenses, etc.—See Political Code Cal., Secs. 3356–3385, “Licenses,” and 3607–3892, “Revenue.”

432. Every person who has in his possession, with intent to circulate or sell, any blank licenses or poll tax receipts other than those furnished by the Controller of State or County Auditor, is guilty of felony.

Having blank receipts for licenses, etc., other than those prescribed by law.

NOTE.—Stats. 1861, p. 419; 1855, p. 172, Sec. 5. See Secs. 3356–7, 3839–3845, Political Code Cal.

433. [Was repealed by an Act entitled “An Act to amend and in relation to THE POLITICAL, CIVIL, and PENAL CODES, and THE CODE OF CIVIL PROCEDURE,” approved April first, eighteen hundred and seventy-two, now on file in the office of the Secretary of State.]

Repealed.

NOTE.—This section was repealed in consequence of amendments to the Federal Constitution superseding or overriding the foreign miners’ tax of this State.

434. Every person who, when requested by the Collector of taxes or licenses, refuses to give to such Collector the name and residence of each man in his

Refusing to give name of persons in employment, etc.

employment, or to give such Collector access to the building or place where such men are employed, is guilty of a misdemeanor.

NOTE.—Stats. 1864, p. 45, Sec. 1. This section was more particularly applicable to the collection of foreign miners' license; but it is competent for the Collector to enforce this information from any one when collecting taxes.—See, also, Secs. 3848–3850, Political Code Cal.

Carrying
on business
without
license.

435. Every person who commences or carries on any business, trade, profession, or calling, for the transaction or carrying on of which a license is required by any law of this State, without taking out or procuring the license prescribed by such law, is guilty of a misdemeanor.

NOTE.—Stats. 1861, p. 419, Sec. 77; 1863, p. 732, Sec. 1. See "Licenses," Secs. 3356–3386, Political Code Cal. The Act of 1872, p. 684, relating to licenses, is void under Sec. 330, Political Code.

Unlawfully
acting as
auctioneer.

436. Every person who acts as an auctioneer in violation of the laws of this State relating to auctions and auctioneers, is guilty of a misdemeanor.

NOTE.—See "Auctioneers," Secs. 3284–3292, Political Code Cal.; id., Sec. 3376—classes.

Repealed.

437. [Repealed by Act of April first, eighteen hundred and seventy-two, cited in note in lieu of Section 433, ante.]

Repealed.

438. [Repealed by Act of April first, eighteen hundred and seventy-two, cited in note in lieu of Section 433, ante.]

NOTE.—The two preceding repealed sections became inoperative and unnecessary by the stamp tax being declared unconstitutional in *Brumagim vs. Tillinghast*, 18 Cal., p. 265.

Effecting
insurance
on account
of foreign
companies
that have
not com-
plied with
the laws of
this State.

439. Every person who in this State procures, or agrees to procure, any insurance for a resident of this State, from any insurance company not incorporated under the laws of this State, unless such company or its agent has filed the bond required by the laws of

this State relating to insurance, is guilty of a misdemeanor.

NOTE.—See Stats. 1862, p. 243, and Acts amendatory thereof. See bonds from foreign corporations.—Sec. 623, Political Code Cal.

440. Every officer charged with the collection, receipt, or disbursement of any portion of the revenue of this State, who, upon demand, fails or refuses to permit the Controller or Attorney General to inspect his books, papers, receipts, and records pertaining to his office, is guilty of a misdemeanor.

Officer charged with collection, etc., of revenue, refusing to permit inspection of his books.

NOTE.—Stats. 1852, p. 57, Sec. 2.

441. Every member of the Board of Examiners and every Controller or State Treasurer who violates any of the provisions of the laws of this State relating to the Board of Examiners, or prescribing its powers and duties, is guilty of a felony.

Board of Examiners, Controller, and Treasurer neglecting certain duties.

NOTE.—See "Board of Examiners."—Political Code Cal., Secs. 654–685, and notes, and the Act of 1872, p. 121, there cited in full.

442. Every person who unlawfully retains in his possession any arms, equipments, clothing, or military stores belonging to the State, or the property of any company of the State militia, is guilty of a misdemeanor.

Having State arms, etc.

NOTE.—Stats. 1866, p. 735, Sec. 50. Arms, how procured, etc.—See Secs. 1963–1968; and Act of 1872, p. 122, there cited.

443. Every member of the State militia who unlawfully disposes of any arms, equipments, clothing, or military stores, the property of this State, or of any company of the State militia, is guilty of a misdemeanor.

Selling State arms, etc.

NOTE.—See note to preceding section.

TITLE XIII.

OF CRIMES AGAINST PROPERTY.

CHAPTER I. *Arson.*

- II. *Burglary and housebreaking.*
- III. *Having possession of burglarious instruments and deadly weapons.*
- IV. *Forgery and counterfeiting.*
- V. *Larceny.*
- VI. *Embezzlement.*
- VII. *Extortion.*
- VIII. *False personation and cheats.*
- IX. *Fraudulently fitting out and destroying vessels.*
- X. *Fraudulently keeping possession of wrecked property.*
- XI. *Fraudulent destruction of property insured.*
- XII. *False weights and measures.*
- XIII. *Fraudulent insolvencies by corporations, and other frauds in their management.*
- XIV. *Fraudulent issue of documents of title to merchandisc.*
- XV. *Malicious injuries to railroad bridges, highways, bridges, and telegraphs.*

CHAPTER I.

ARSON.

SECTION 447. *Arson defined.*

- 448. *"Building" defined.*
- 449. *"Inhabited building" defined.*
- 450. *"Night time" defined.*
- 451. *"Burning" defined.*
- 452. *Ownership of the building.*
- 453. *Degrees of arson.*

SECTION 454. Arson of the first degree. Arson of the second degree.
455. Punishment of arson.

447. Arson is the willful and malicious burning of Arson defined.
a building, with intent to destroy it.

NOTE.—This is also the definition of the N. Y. Penal Code.—See Sec. 521; 4 Blackst. Com., p. 220. The statutes of this State had enlarged the use of the term to include many acts of burning not involving special danger to the person. Thus, burning stacks of grain, standing crops, bridges, etc., was arson in the second degree.—Stats. 1856, p. 131, Secs. 4, 5. The Code confines the term “arson” to the offense of setting on fire buildings (including ships and vessels). Other criminal acts of burning are not properly classified under the title of “Arson,” but under the title of “Malicious mischief,” post. See, also, “Setting woods on fire,” Sec. 384, ante. The definition of the text is substantially that of the common law authorities. They, nearly all, restrict the offense to the burning of a dwelling house, or some edifice adapted for or connected with human occupation; making the gravity of the offense to consist in the peril to the person which such burning involves.—4 Blackst. Com., p. 220; 2 East P. C., p. 1015; Barb. Cr. L., p. 53; Whart. Am. Cr. L., p. 534; Coke Ch., pp. 15, 66; State vs. Roe, 12 Verm., p. 93; People vs. Cotteral, 18 Johns., p. 115; see, also, laws of Ga., p. 712; 4 U. S. Stats. at L., p. 115; Rep. Cr. Code, Mass. The legislative intent in the many Acts on this subject was good, but the Acts were very apt from their prolixity to be ineffectual. The Act of 1872, p. 895, is void under Sec. 330 of the Pol. Code, but there is ample provision in this Code for all such offenses, as will be seen.

448. Any house, edifice, structure, vessel, or other erection, capable of affording shelter for human beings, “Building” defined.
or appurtenant to or connected with an erection so adapted, is a “building,” within the meaning of this Chapter.

NOTE.—Stats. 1856, p. 131, Sec. 6; People vs. Stickman, 34 Cal., p. 244, defines a house to be any structure having walls on all sides, and a roof. What is sufficient indictment for “arson.”—See People vs. Lipps, 39 Cal., p. 331.

"Inhabited
building"
defined.

449. Any building which has usually been occupied by any person lodging therein at night is an "inhabited building," within the meaning of this Chapter.

NOTE.—Stats. 1856, p. 131, Sec. 6.

"Night
time"
defined.

450. The phrase "night time," as used in this Chapter, means the period between sunset and sunrise.

"Burning"
defined.

451. To constitute a burning, within the meaning of this Chapter, it is not necessary that the building set on fire should have been destroyed. It is sufficient that fire is applied so as to take effect upon any part of the substance of the building.

NOTE.—State vs. Sandy, 5 Ired., p. 570; People vs. Butler, 16 Johns., p. 203; Commonwealth vs. Van Shaack, 16 Mass., p. 105; Reg. vs. Parker, 9 Carr. & P., p. 45; Reg. vs. Russel, 1 Carr. & M., p. 541; see, also, Hester vs. State, 17 Geo., p. 130; State vs. De Bruhl, 10 Rich. Law, p. 23. See, also, Cal. cases, cited under previous sections; also People vs. Hughes, 29 Cal., p. 329, where the burning was a fraud on the insurer; and People vs. Scott, 32 Cal., p. 200, where ownership of the land may not be questioned, if right to possess or occupy the house is shown to be in the person residing in it, and who, in the indictment, is charged as owning and residing in it, so that it now seems to be pretty well settled that an omission to designate, or error in designating in an indictment for arson, the owner or occupant of a building, shall not prejudice the proceedings thereupon, if it appears that upon the whole description given of the building, it is sufficiently identified to enable the prisoner to prepare his defense. On this subject see Sec. 452 and note, post, and compare Martha vs. State, 26 Ala., p. 72; State vs. Fish, 3 Dutch., p. 323. It would appear but reasonable, as well as just, that malice sufficient to constitute arson should be inferred from proof that the prisoner committed an act of burning a building, and that some other person was rightfully in possession of, or actually occupying, any part thereof. It ought not to be necessary that the accused should have had actual knowledge of such possession or occupancy, or should have intended to injure another person.—See Rex vs. Farrington, Russ. & Ry. C. C., p. 207; People vs. Van Barcum, 2 Johns., p.

105; *People vs. Orcutt*, 1 Park. Cr., p. 252; *People vs. Henderson*, id., p. 563; *Jesse vs. State*, 28 Miss., p. 100. In *Reg. vs. Regan*, 4 Cox Cr. Cas., p. 385, it appeared that the prisoner's intent in setting fire to the building was to obtain a reward offered for giving the earliest intimation of a fire, at the engine station. *Held*, he was guilty of arson. But the burning of a building, under circumstances which shows beyond a reasonable doubt that there was no intent to destroy it, is not arson.—*People vs. Cotteral*, 18 Johns., p. 115; *State vs. Mitchell*, 5 Ired., p. 350. But where any appurtenance to any building is so situated with reference to such building, or where any building is so situated with reference to another building that the burning of the one will manifestly endanger the other, a burning of the one is deemed a burning of the other within the foregoing definition of arson, and as against any person actually participating in the original setting fire, as of the moment when the fire from the one shall communicate to and burn the other.—*Robert's Case*, 2 East P. C., p. 1030; *Isaac's Case*, id., p. 1031; *Reg. vs. Fletcher*, 2 Carr. & K., p. 215; *Reg. vs. Price*, 1 id., p. 73; *Rex vs. Petley*, Leach C. C., p. 277.

452. To constitute arson it is not necessary that a person other than the accused should have had ownership in the building set on fire. It is sufficient that at the time of the burning another person was rightfully in possession of, or was actually occupying such building, or any part thereof.

Ownership
of the
building.

NOTE.—*People vs. Van Blarcum*, 2 Johns., p. 105; *Shepherd vs. People*, 19 N. Y. (5 Smith), p. 537; *State vs. Taylor*, 45 Me., p. 322. At common law arson was the maliciously burning the house of *another*.—*East P. C.*, p. 1015. And one could not be convicted of arson in burning his own house.—*Rex vs. Pealey*, Leach C. C., p. 277; *Rex vs. Breeme*, id., p. 261; *Rex vs. Spalding*, Leach C. C., p. 248. The offense of burning insured property, with intent to defraud the insurers, is provided for in Chapter XI of this Title. See note to preceding section.

453. Arson is divided into two degrees.

Degrees of
arson.

NOTE.—Stats. 1856, p. 132, Secs. 4, 5.

454. Maliciously burning in the night-time an inhabited building in which there is at the time some

Arson of
the first
degree.

Arson of
the second
degree.

human being, is arson in the first degree. All other kinds of arson are of the second degree.

NOTE.—Stats. 1856, p. 132, Secs. 4, 5; similar to N. Y., Sec. 532. Taken in connection with the definition of “building,” and “inhabited,” given in Secs. 448 and 449, ante, this section would embrace as arson in the first degree the burning of a ship or vessel while lying within this State, if committed in the night-time, for it is an offense of as grave a character as burning an inhabited dwelling.

Punish-
ment of
arson.

455. Arson is punishable by imprisonment in the State Prison, as follows:

1. Arson in the first degree, for not less than two years.

2. Arson in the second degree, for not less than one nor more than ten years.

NOTE.—This Chapter is founded upon Secs. 4, 5, and 6 of Act concerning crimes and punishments of 1856.—Stats. 1856, p. 132. The text omits the clause in Sec. 4 which provides that “should the lives of any persons be lost in consequence of such burning the offender shall be deemed guilty of murder, and shall be indicted and punished accordingly.” This provision is surplusage, for the killing in that case is in the perpetration of arson, and falls within the definition of murder in the first degree.—See Sec. 189, ante.

CHAPTER II.

BURGLARY AND HOUSEBREAKING.

SECTION 459. “Burglary” defined.

460. Punishment of burglary.

461. “Housebreaking” defined.

462. Punishment of housebreaking.

463. “Night-time” defined.

“Burglary”
defined.

459. (§ 58.) Every person who, in the night-time, forcibly breaks and enters, or without force enters through any open door, window, or other aperture, any house, room, apartment, or tenement, or any tent, ves-

sel, water craft, or railroad car, with intent to commit grand or petit larceny, or any felony, is guilty of burglary.

NOTE.—Stats. 1858, p. 206. It was held to be necessary to charge the value of the goods intended to be stolen, in *People vs. Murray*, 8 Cal., p. 520. Between six and seven o'clock in the evening, on the 31st August, is not in the night-time.—*People vs. Griffin*, 19 Cal., p. 578. The *People vs. Shaber*, 32 Cal., p. 36, seems to be repugnant to the case of 8 Cal., first supra. This case was decided by Shafter, J., Sanderson, J., dissenting, on the ground that it is not sufficient to charge the offense generally with the *intent to commit a larceny*. The Case of *People vs. Stickman*, 34 Cal., p. 244, fully discusses "dwelling" and "house," and affirms a judgment of guilty in breaking into a chicken house and stealing chickens, holding the statute to include as a house "any structure which has walls on all sides and is covered by a roof." To charge the offense in the night-time is sufficient, without giving the hour, and if the hour is alleged, it is unnecessary to prove it.—*People vs. Burgess*, 35 Cal., p. 117; *East's Pleas of the Crown*, p. 513; *Wharton's A. C. L.*, Secs. 270, 271, 612. Ownership is correctly laid in one who exercises control of the whole house.—*People vs. St. Clair*, 38 Cal., p. 137. Larceny may not be included as part of the offense of burglary; it is the subject of a separate indictment under our system.—*People vs. Garnett*, 29 Cal., p. 626.

460. Burglary is punishable by imprisonment in the State Prison for not less than one nor more than fifteen years.

Punish-
ment of
burglary.

NOTE.—By the Act of 1858 (Stats. 1858, p. 206), the crime of burglary was punishable by imprisonment in the State Prison for a term not less than one nor more than ten years, whilst grand larceny, a less heinous crime, might be punished with imprisonment in the State Prison for fourteen years.—Stats. 1856, p. 219, Sec. 7. The Code reduces the maximum punishment for larceny from fourteen years to ten years, and increases that of burglary from ten years to fifteen years. The Code makes no attempt to define the words "breaking" or "entering," but leaves the meanings of those words as now quite well settled by adjudication. For cases on the subject, see California cases cited in note to Sec. 459,

ante, and also, *Rex vs. Cornwall*, 2 Stra., p. 880; *Rex vs. Gray*, 1 id., p. 481; *Rex vs. Gibbons*, Fost., p. 107; *Rex vs. Hughes*, Leach C. C., p. 452; *Reg. vs. Davis*, 6 Cox Cr. Cas., p. 367; *Reg. vs. O'Brien*, 4 id., p. 398; *Reg. vs. Meal*, 3 id., p. 70; *Reg. vs. Wenmouth*, 8 Cox Cr. Cas., p. 483; *Reg. vs. Wheeldon*, 8 Carr. & P., p. 747; *Rex vs. Paine*, 7 id., p. 135; *Rex vs. Jordan*, 7 id., p. 432; *Reg. vs. Bird*, 9 id., p. 44; *Rex vs. Hughes*, 1 Leach C. C., p. 406; 2 East P. C., p. 491; *Rex vs. Lewis*, 2 Carr. & P., p. 628; *Rex vs. Brown*, 2 East P. C., p. 487; 2 Leach C. C., p. 1016; *Rex vs. Johnson*, 2 East P. C., p. 488; *Rex vs. Bailey*, Russ. & R. C. C., p. 841; 2 Russ. C. & M., p. 12; 1 R. & M. C. C., p. 23; *Rex vs. Perkes*, 1 Carr. & P., p. 300; *Rex vs. Lawrence*, 4 Carr. & P., p. 231; *Rex vs. Russell*, 1 M. C. C. R., p. 377; *State vs. McCall*, 4 Ala., p. 643; *State vs. Wilson*, Coxe, p. 439; *Commonwealth vs. Steward*, 7 Dane's Ab., p. 136; *Com. vs. Stephenson*, 8 Pick., p. 354; *People vs. Boujet*, 2 Park. Cr. Rep., p. 11; *Commonwealth vs. Trimmer*, 1 Mass., p. 476; *Finch's Case*, 14 Gratt., p. 643; *Guche's Case*, 6 City Hall Rec., p. 1; *Robertson's Case*, 4 id., p. 63; *Smith's Case*, id., p. 62; *People vs. Tralick*, Hill & D., p. 63; *People vs. Bush*, 3 Park. Cr., p. 552.

"House-breaking" defined.

461. (§ 127.) Every person who, in the day-time, enters any dwelling house, shop, warehouse, store, mill, barn, stable, outhouse, other building, vessel, or railroad car, with intent to steal or to commit any felony whatever therein, is guilty of housebreaking.

NOTE.—Stats. 1864, p. 104, Sec. 1; 28 Cal., p. 214. "Day-time" is from sunrise to sunset. See Sec. 463, post, for "night-time." It is error to charge a jury that if defendant "was with one who did steal as charged in the indictment, and saw him steal without interference * * * to prevent it, upon the defendant will devolve the labor of proving himself innocent."—*People vs. Ah Ping*, 27 Cal., p. 490. As to identity and matters of description in two Courts being obnoxious to the requirement that but one offense be charged, see *People vs. Thompson*, 28 Cal., p. 218.

Punishment of house-breaking.

462. Housebreaking is punishable by imprisonment in the State Prison for not less than one nor more than five years.

NOTE.—Stats. 1864, p. 104, Sec. 1.

462. A distinct offense from that defined in Section 459, an *People v. Taggart*, 43 Cal. 83.

463. The phrase "night-time," as used in this Chapter, means the period between sunset and sunrise. "Night time" defined.

NOTE.—Between six and seven o'clock in the evening of August 31st is not night-time.—People vs. Griffin, 19 Cal., p. 578.

CHAPTER III.

HAVING POSSESION

VARIOUS INSTRUMENTS AND

SECTION 466. Having

467. Having

466 (§ 127.)

picklock, crow
intent feloniously
is guilty of a m

467. (§ 127.)

deadly weapon
of a misdemeanor

466. Every person having upon him, or in his possession, a pick-lock, crow, key, bit, or other instrument or tool, with intent feloniously to break or enter into any building, or who shall knowingly make or alter, or shall attempt to make or alter, any key or other instrument above named, so that the same will fit or open the lock of a building, without being requested so to do by some person having the right to open the same, or who shall make, alter, or repair any instrument or thing, knowing, or having reason to believe, that it is intended to be used in committing a misdemeanor or felony, is guilty of misdemeanor. Any of the structures mentioned in section four hundred and fifty-nine of this Code, shall be deemed to be a building within the meaning of this section. [Approved March 3, 1874.]

CHAPTER IV.

FORGERY AND COUNTERFEITING.

SECTION 470. Forgery of wills, conveyances, notes, bonds, etc.

Uttering forged notes, bonds, etc. Forgery of records and official returns.

471. Making false entries in records or returns.

472. Forgery of public and corporate seals.

473. Punishment of forgery.

474. Forging telegraphic messages.

475. Passing or receiving forged notes.

476. Making, passing, or uttering fictitious bills, etc.

477. Counterfeiting coin, bullion, etc.

478. Punishment of counterfeiting.

SECTION 479. Possessing or receiving counterfeit coin, bullion, etc.

480. Making or possessing counterfeit dies or plates.

Forgery of
wills, con-
veyances,
notes,
bonds, etc.

470. (§ 73.) Every person who, with intent to defraud another, falsely makes, alters, forges, or counterfeits any charter, letters, patent, deed, lease, indenture, writing obligatory, will, testament, codicil, annuity, bond, covenant, bank bill or note, post note, check, draft, bill of exchange, contract, promissory note, due bill for the payment of money or property, receipt for money or property, passage ticket, power of attorney, or any certificate of any share, right, or interest in the stock of any corporation or association, or any Controller's warrant for the payment of money at the Treasury, county order or warrant, or request for the payment of money, or the delivery of goods or chattels of any kind, or for the delivery of any instrument of writing, or acquittance, release, or receipt for money or goods, or any acquittance, release, or discharge for any debt, account, suit, action, demand, or other thing, real or personal, or any transfer or assurance of money, certificates of shares of stock, goods, chattels, or other property whatever, or any letter of attorney, or other power to receive money, or to receive or transfer certificates of shares of stock or annuities, or to let, lease, dispose of, alien, or convey any goods, chattels, lands, or tenements, or other estate, real or personal, or any acceptance or indorsement of any bill of exchange, promissory note, draft, order, or assignment of any bond, writing obligatory, or promissory note for money or other property, or counterfeits or forges the seal or handwriting of another; or utters, publishes, passes, or attempts to pass, as true and genuine, any of the above named false, altered, forged, or counterfeited matters, as above specified and described, knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person; or who,

Uttering
forged
notes,
bonds, etc.

with intent to defraud, alters, corrupts, or falsifies any record of any will, codicil, conveyance, or other instrument, the record of which is by law evidence, or any record of any judgment of a Court, or the return of any officer to any process of any Court, is guilty of forgery.

Forgery of
records
and official
returns.

NOTE.—13 Cal., p. 336; 28 Cal., p. 507; 28 Cal., p. 205; 27 Cal., p. 394; 35 Cal., p. 503. The definition has been extended to cover cases not included within the definition given by our statutes (Stats. 1850, p. 229), but which are of equal enormity. Forging, attempting to pass, and passing as genuine a check, if charged in the various counts of an indictment, so as to show in each that the same check is referred to, constitutes but one crime.—People vs. Shotwell, 27 Cal., p. 400. Though one of the various acts mentioned in the law constitutes the crime, they all do no more than to charge one crime or offense.—People vs. Frank, 28 Cal., p. 513. Forms of pleading under the Criminal Practice Act of this State clearly set out in People vs. Ah Woo, 28 Cal., p. 208. If the forged or counterfeit order is in the Chinese language, to set it out in English in the indictment is good.—Id., referring to Sec. 235, Crim. Prac. Act; People vs. Ah Sing, 17 Cal., p. 598; People vs. Vance, 21 Cal., p. 403; People vs. King, 27 Cal., p. 507; People vs. Littlefield, 5 Cal., p. 355; People vs. Lloyd, 9 Cal., p. 55; People vs. Ybana, 17 Cal., p. 166; 2 Whart. Crim. Law, Sec. 1466. If the indictment merely sets out an instrument which is a nullity upon its face, without any averment showing it can be made to act injuriously or fraudulently, by reason of matter *aliunde* no case is made.—People vs. Tomlinson, 35 Cal., p. 507, where are cited in support of this rule, Rex vs. Knight, 1 Salk., p. 375; 1 Lord Raym., p. 527; Regina vs. Marcus, 2 Carr. & Kir., p. 356; People vs. Shall, 9 Cowen, p. 778; People vs. Harrison, 8 Barb., p. 560; State vs. Briggs, 34 Vt., p. 501; Commonwealth vs. Ray, 3 Gray, p. 441; Barnum vs. The State, 15 Ohio, p. 717; Clarke vs. The State, Ohio St., p. 630. In this case the cases of Ah Woo and Frank, *supra*, sustained; and it is further held that when acts separately or all together constitute the offense the indictment must charge them conjunctively, with the conjunction “and,” and not disjunctively, with the use of the word “or.” When the word “or” is used the indictment was held bad for uncertainty.—2 Hawk., Chap. 35, Sec. 58; Rex vs.

Stokes, 1 Salk., p. 342; People vs. Hood, 6 Cal., p. 236; Com. vs. Gray, 2 Gray, p. 501; Rex vs. Stoughton, 2 Str., p. 900. Per contra, in U. S. vs. Potter, 6 McLean C. C., p. 186, it was held that "cutting or causing to be cut" was not fatal. "And" should be used in all such cases.

Making
false
entries in
records or
returns.

471. (§ 73.) Every person who, with intent to defraud another, makes, forges, or alters any entry in any book of records, or any instrument purporting to be any record or return specified in the preceding section, is guilty of forgery.

Forgery of
public and
corporate
seals.

472. Every person who, with intent to defraud another, forges, or counterfeits the seal of this State, the seal of any public officer authorized by law, the seal of any Court of record, or the seal of any corporation, or any other public seal authorized or recognized by the laws of this State, or of any other State, Government, or country, or who falsely makes, forges, or counterfeits any impression purporting to be an impression of any such seal, or who has in his possession any such counterfeited seal or impression thereof, knowing it to be counterfeited, and willfully conceals the same, is guilty of forgery.

NOTE.—Founded upon Sec. 81 of the Crimes and Punishment Act (Stats. 1850, p. 229), extended to include corporate and foreign seals.

Punish-
ment of
forgery.

473. (§ 73.) Forgery is punishable by imprisonment in the State Prison for not less than one nor more than fourteen years.

Forging
telegraphic
messages.

474. Every person who knowingly and willfully sends by telegraph to any person a false or forged message, purporting to be from such telegraph office, or from any other person, or who willfully delivers, or causes to be delivered to any person any such message falsely purporting to have been received by telegraph, or who furnishes or conspires to furnish, or causes to be furnished to any agent, operator, or employé, to be

sent by telegraph, or to be delivered, any such message, knowing the same to be false or forged, with the intent to deceive, injure, or defraud another, is punishable by imprisonment in the State Prison not exceeding five years, or in the County Jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both fine and imprisonment.

475. (§ 76.) Every person who has in his possession, or receives from another person, any forged promissory note or bank bill, or bills, for the payment of money or property, with the intention to pass the same, or to permit, cause, or procure the same to be uttered or passed, with the intention to defraud any person, knowing the same to be forged or counterfeited, or has or keeps in his possession any blank or unfinished note or bank bill made in the form or similitude of any promissory note or bill for payment of money or property, made to be issued by any incorporated bank or banking company, with intention to fill up and complete such blank and unfinished note or bill, or to permit, or cause, or procure the same to be filled up and completed in order to utter or pass the same, or to permit, or cause, or procure the same to be uttered or passed, to defraud any person, is punishable by imprisonment in the State Prison for not less than one nor more than fourteen years.

Passing or receiving forged notes.

475. To constitute the crime of possessing forged notes with intent to pass them, the law only requires the guilty possession. It is not necessary that the intent to fill up unfinished notes should be proven by an attempt to do so. Possession, with knowledge of the purpose for which they are designed, is sufficient. *People v. Ah Sam*, 41 Cal. 645.

NOTE.—See notes to Secs. 479, 480, post.

476. (§ 77.) Every person who makes, passes, utters, or publishes, with intention to defraud any other person, or who, with the like intention, attempts to pass, utter, or publish, or who has in his possession, with like intent to utter, pass, or publish, any fictitious bill, note, or check, purporting to be the bill, note, or check, or other instrument in writing for the payment of money or property of some bank, corporation, co-partnership, or individual, when, in fact, there is no

Making, passing, or uttering fictitious bills, etc.

such bank, corporation, copartnership, or individual in existence, knowing the bill, note, check, or instrument in writing to be fictitious, is punishable by imprisonment in the State Prison for not less than one nor more than fourteen years.

Counter-
feiting
coin,
bullion,
etc.

477. (§ 74.) Every person who counterfeits any of the species of gold or silver coin current in this State, or any kind or species of gold dust, gold or silver bullion, or bars, lumps, pieces, or nuggets, or who sells, passes, or gives in payment such counterfeit coin, dust, bullion, bars, lumps, pieces, or nuggets, or permits, causes, or procures the same to be sold, uttered, or passed, with intention to defraud any person, knowing the same to be counterfeited, is guilty of counterfeiting.

NOTE.—This section is framed from Sec. 74 of the Crimes and Punishment Act, and is extended to include the kindred offenses provided for in Sec. 1 of the Act in relation to counterfeiting gold dust, etc., Stats. 1855, p. 178, and also to include counterfeiting silver bars, etc.

Punish-
ment of
counter-
feiting.

478. (§§ 76, 77.) Counterfeiting is punishable by imprisonment in the State Prison for not less than one nor more than fourteen years.

NOTE.—Stats. 1855, p. 178, Secs. 1, 2.

Possessing
or receiving
counterfeit
coin, bul-
lion, etc.

479. (§ 75.) Every person who has in his possession, or receives for any other person, any counterfeit gold or silver coin of the species current in this State, or any counterfeit gold dust, gold or silver bullion or bars, lumps, pieces, or nuggets, with the intention to sell, utter, put off, or pass the same, or permits, causes, or procures the same to be sold, uttered, or passed, with intention to defraud any person, knowing the same to be counterfeit, is punishable by imprisonment in the State Prison not less than one nor more than fourteen years.

NOTE.—Founded upon Section 75 of the Crimes and Punishment Act, and Section 2 of Act to prevent counterfeiting gold dust, etc. (Stats. 1855, p. 178), extended

to include silver bars, etc. Proof.—People vs. Farrell, 30 Cal., p. 316. Indictment.—People vs. White, 34 Cal., p. 183, in which case also is discussed the constitutionality of the Act. Art. 1, Sec. 8, Subds. 5 and 6, of the Federal Constitution and the Laws of Congress, 2 U. S. Stats. at Large, p. 404; 4 id., p. 121, do not prohibit the punishment of the crime of counterfeiting by the State. Fox vs. State of Ohio, 5 Howard, p. 410; and Moon vs. Illinois, 14 id., p. 13; the U. S. Stats. at Large permit the State

Courts to punish. **481.** Every person who counterfeits, forges, or makes, or causes to be made, any ticket, check, order, coupon, receipt for fare or which the company, issued by any railroad company, or by any lessee or manager thereof, designed to entitle the holder

480. (§ 78.) Every person who knowingly has in his possession or puts into circulation, any such counterfeit, or forged ticket, check, or order, coupon, receipt for fare or made use of in counterfeiting, with intent to defraud any such railroad company, or any lessee thereof, or any other person, is punishable by imprisonment in the State Prison, or in the County Jail, not exceeding one year, or by fine not exceeding one thousand dollars, or by both such imprisonment and fine.

teen years; and all such counterfeit, forged ticket, check, or order, coupon, receipt for fare or made use of in counterfeiting, must be destroyed.

NOTE.—The cuts, marks, punch-holes, or other evidence of cancellation, from any ticket, check, order, coupon, receipt for fare or pass, issued by any railroad company, or any lessee or manager thereof, canceled whole or in part, with intent to dispose of by sale or gift, or to circulate the same, or with intent to defraud the railroad company, or lessee thereof, or any other person, or who, with like intent to defraud, offers for sale, or in payment of fare on the railroad of the company, such ticket, check, order, coupon, or pass, knowing the same to have been so restored, in whole or in part, is punishable by imprisonment in the

SECTION 484. "Larceny of any ticket, check, order, coupon, receipt for fare or pass, issued by any railroad company, or any lessee or manager thereof, canceled whole or in part, with intent to dispose of by sale or gift, or to circulate the same, or with intent to defraud the railroad company, or lessee thereof, or any other person, or who, with like intent to defraud, offers for sale, or in payment of fare on the railroad of the company, such ticket, check, order, coupon, or pass, knowing the same to have been so restored, in whole or in part, is punishable by imprisonment in the County Jail, not exceeding six months, or by a fine not exceeding one thousand dollars, or by both such imprisonment and fine."

485. Larceny of any ticket, check, order, coupon, receipt for fare or pass, issued by any railroad company, or any lessee or manager thereof, canceled whole or in part, with intent to dispose of by sale or gift, or to circulate the same, or with intent to defraud the railroad company, or lessee thereof, or any other person, or who, with like intent to defraud, offers for sale, or in payment of fare on the railroad of the company, such ticket, check, order, coupon, or pass, knowing the same to have been so restored, in whole or in part, is punishable by imprisonment in the County Jail, not exceeding six months, or by a fine not exceeding one thousand dollars, or by both such imprisonment and fine.

486. Grand and petty larceny of any ticket, check, order, coupon, receipt for fare or pass, issued by any railroad company, or any lessee or manager thereof, canceled whole or in part, with intent to dispose of by sale or gift, or to circulate the same, or with intent to defraud the railroad company, or lessee thereof, or any other person, or who, with like intent to defraud, offers for sale, or in payment of fare on the railroad of the company, such ticket, check, order, coupon, or pass, knowing the same to have been so restored, in whole or in part, is punishable by imprisonment in the County Jail, not exceeding six months, or by a fine not exceeding one thousand dollars, or by both such imprisonment and fine.

487. Grand larceny of any ticket, check, order, coupon, receipt for fare or pass, issued by any railroad company, or any lessee or manager thereof, canceled whole or in part, with intent to dispose of by sale or gift, or to circulate the same, or with intent to defraud the railroad company, or lessee thereof, or any other person, or who, with like intent to defraud, offers for sale, or in payment of fare on the railroad of the company, such ticket, check, order, coupon, or pass, knowing the same to have been so restored, in whole or in part, is punishable by imprisonment in the County Jail, not exceeding six months, or by a fine not exceeding one thousand dollars, or by both such imprisonment and fine.

SECTION 488. Petit larceny.

489. Punishment of grand larceny.

490. Punishment of petit larceny.

491. Dogs property.

492. Larceny of written instruments.

493. Value of passage tickets.

494. Written instruments completed but not delivered.

495. Severing and removing part of the realty declared larceny.

496. Receiver of stolen property.

497. Larceny committed and stolen property received out of this State.

498. Stealing gas.

499. Stealing water.

500. Larceny of goods saved from fire in San Francisco.

501. Purchasing or receiving in pledge junk, etc., of minors, misdemeanor.

502. Applies Sections 339, 342, and 343 to junk dealers, etc.

"Larceny"
defined.

484. (§§ 60, 61.) Larceny is the felonious stealing, taking, carrying, leading, or driving away the personal property of another.

NOTE.—Stats. 1856, p. 219, Sec. 7. "Proof of the felonious and fraudulent taking with intent to deprive the owner of the property, is sufficient to charge the defendant without proof that he intended to convert the property to his own use."—People vs. Juarez, 28 Cal., p. 382. "Our Criminal Code, however, describes no such offense as burglary complicated and mixed with another felony. If, in addition to burglary, another offense has been committed, it must be made the foundation of another indictment."—People vs. Garnett, 29 Cal., p. 626. One holding a quitclaim deed as *bailee*, made to himself, commits no larceny in converting it to his own use.—People vs. Mackinley, 9 Cal., p. 250. Taking one's own property with the intention and purpose of charging a bailee therewith and cause him loss, is larceny.—People vs. Stone, 16 Cal., p. 369; see People vs. Cohen, 8 Cal., p. 42; and People vs. Poggi, 19 Cal., p. 600, on "*bailee*," etc. A bailee obtaining property as such intending to convert it, and does convert it to his own use, is guilty of larceny.—People vs. Smith, 23 Cal., p. 280. It would be different if the intent to steal arose or was conceived after the taking.—Id.; People vs. Jersey, 18 Cal., p. 337; People vs. Bogart, 36 Cal., p. 247. This latter case goes also to the point of description of the subject of the larceny, and the description of the owner or person

from whom the larceny was committed, holding that Wells, Fargo & Co., not describing the persons composing the firm, was bad.—See *Commonwealth vs. Trimmer*, 1 Mass., p. 476; *Hogg vs. The State*, 3 Blackf., p. 326; *State vs. Owens*, 10 Rich. L. R., S. C., p. 169. It would have been good had it charged Wells, Fargo & Co. to be a corporation.—2 Russ on Crimes, p. 99; *People vs. Schwartz*, 32 Cal., p. 160. The possession of stolen goods will not alone sustain an indictment for larceny; it is a circumstance, however, to be considered with others.—*People vs. Chambers*, 18 Cal., p. 382. One who with guilty knowledge of the larceny receives stolen goods may not be convicted in the county where the crime was committed if he was not there, but in another county; he should be prosecuted where he so received them as receiving stolen property.—*People vs. Stakern*, 40 Cal., p. 599. The one who commits the larceny may, however, be prosecuted in any county into which he conveys the property.—*People vs. Mellon*, id., p. 648. The element of value does not enter into the offense as defined by Act of March 28th, 1868, providing for stealing horse, mare, etc., and it is competent for the Legislature to declare this grand larceny.—*People vs. Townsley*, 39 Cal., p. 406. Distinction between *larceny* and *embezzlement* by a bailee is, “in the first place the guilty party has, and in the latter case he has not, possession of the property at the time of the commission of the offense.—*People vs. Belden*, 37 Cal., p. 53; *Whart. Am. Cr. Law*, notes to Sec. 1907, et seq.; *People vs. Bogart*, 36 Cal., p. 247; *People vs. Garcia*, 25 Cal., p. 531; see, also, on same points as to bailees and felonious conversions, *People vs. Jersey*, 18 Cal., p. 337; *People vs. Cohen*, 8 id., p. 42; *People vs. Peterson*, 9 Cal., p. 313; *People vs. Poggi*, 19 Cal., p. 60. Describing property in the indictment.—*People vs. Bogart*, 36 Cal., p. 247; *People vs. Littlefield*, 5 id., p. 355; *People vs. Green*, 15 Cal., p. 512; *People vs. Smith*, 15 Cal., p. 408; *People vs. Ball*, 14 Cal., p. 101. *Owner* must be certainly described.—*People vs. Bogart*, 36 Cal., p. 247; but see *People vs. Ah Sing*, 19 Cal., p. 598; *Commonwealth vs. Trimmer*, 1 Mass., p. 476. *Value*.—*People vs. Robles*, 34 Cal., p. 591; *People vs. Winkler*, 9 Cal., p. 234. As defined in the New York Penal Code, Sec. 584, “larceny is the taking of personal property accomplished by fraud or stealth, or without color of right thereto, and with intent to deprive another thereof.” Our definition was adopted rather than this because our adjudications upon the statute were frequent and the defini-

tion had assumed certainty in the hands of the Courts. It may, however, be well to give some references which go to make plain the different offenses of felonies connected with the ownership of property. Four of the crimes affecting property require to be somewhat carefully distinguished: robbery, larceny, extortion, and embezzlement. The leading distinctions between these may be briefly stated thus. All four include the criminal acquisition of the property of another. In robbery this is accomplished by means of force or fear, and by overcoming or disregarding the will of the rightful possessor. There is a taking of property from another against his consent; the physical power to resist being overcome by force, or what is equivalent in law, the moral power to refuse being prostrated by fear. In larceny there is still a taking; but it is accomplished by fraud or stealth, as by the New York section as specified in the text of Sec. 484, which includes fraud or stealth; the property is taken not *against* the consent of the owner, but *without* it. In extortion there is again a taking. Now this is *with* the consent of the party injured; but it is a consent induced by threats, or under color of some official right. (In embezzlement there is no taking, in the technical sense; that is, no taking from the possession of another. The offender being in possession of the property in virtue of some trust, which the law deems worthy of special sanction, applies it by fraud or stealth, or feloniously steals, takes, carries, leads, or drives it away to his own use, or appropriates it to his own use and deprives the owner thereof.) Thus extortion partakes in an inferior degree of the nature of robbery, and embezzlement shares that of larceny. In larceny it is not necessary that the property taken should be strictly the property of another person. A man may be guilty of stealing his own property, when done with intent to charge another person with the value of it; e. g., where property, which has been levied upon, is stolen from the officer by the general owner.—Palmer vs. People, 10 Wend., p. 165; see also People vs. Call, 1 Den., p. 120. As to what property may be the subject of larceny, see Rex vs. Westbee, Leach, p. 15; Rex vs. Hedge, id., p. 240; Rex vs. Martin, id., p. 205; Rex vs. Cheafor, 2 Den. & P., p. 331; 5 Cox Cr., p. 367; Reg. vs. White, 6 Cox Cr. Cas., p. 213; 7 id., p. 183; Reg. vs. Smith, id., p. 93; Reg. vs. Jones, id., p. 498; Reg. vs. Morrison, 8 Cox Cr. Cas., p. 194; Linenden's Case, 1 City H. Rec., p. 30; Ward vs. People, 6 Hill, p. 144; People vs. Caryl, 12 Wend., p. 547; Johnson vs. People, 4 Den., p. 364; Low vs. People, 2 Park.

embezzlement & defined

Cr., p. 37; *People vs. Loomis*, 4 Den., p. 380; *Payne vs. People*, 6 Johns., p. 103; *People vs. Campbell*, 4 Park. Cr., p. 386; *People vs. Bradley*, id., p. 245; *Corbett vs. State*, 31 Ala., p. 329; *State vs. Hall*, 5 Harring., p. 492; *State vs. Bond*, 8 Clarke, p. 540; *Commonwealth vs. Rourke*, 10 Cush., p. 397; *State vs. Taylor*, 3 Dutch., p. 117. As to what constitutes a sufficient removal or asportation of the property to constitute larceny, see *Rex vs. Coslet*, Leach, p. 271; *Rex vs. Lapier*, id., p. 360; *Rex vs. Farrell*, id., p. 362, n.; *Rex vs. Simpson*, id., p. 362, n.; *Tobias' Case*, 1 City Hall Rec., p. 30; *Phillips' Case*, 4 id., p. 177; *McDowell's Case*, 5 id., p. 94; *Scott's Case*, id., p. 169; *Reg. vs. Hall*, 3 Cox Cr. Cas., p. 245; *Reg. vs. Walis*, id., p. 67; 10 Law T., p. 49; *Reg. vs. Lawrence*, 4 Cox Cr. Cas., p. 438; *Reg. vs. Simpson*, 6 id., p. 422; 24 Law J. (m. c.), p. 7. As to what is an intent to deprive another of his interest in the property taken, within the meaning of the law of larceny, see *Reg. vs. Wynn*, 3 Cox Cr. Cas., p. 269; 1 Den. C. C. R., p. 365; *Reg. vs. Holloway*, 3 Cox Cr. Cas., p. 241; 1 Den. C. C. R., p. 370; *Reg. vs. Beecham*, 5 Cox Cr. Cas., p. 181; *Reg. vs. O'Donnell*, 7 id., p. 337; *Reg. vs. Poole*, id., p. 373; *Reg. vs. Guernsey*, 1 Fost. & F., p. 394; *Crocheron's Case*, 1 City Hall Rec., p. 177; *Ellis vs. People*, 21 How. Pr., p. 356; *State vs. Bond*, 8 Clarke, p. 540; *Hamilton vs. State*, 35 Miss., p. 214; *State vs. Gresser*, 19 Miss., p. 247; *U. S. vs. Durkee*, 1 McAll. C. C., p. 196; *Alexander vs. State*, 12 Texas, p. 540; *Dignowitt vs. State*, 17 Texas, p. 521. For cases upon the distinction between a taking, originally felonious, and which is therefore larceny, and possession acquired without intent to steal, and followed by a wrongful appropriation, see *Rex vs. Bass*, Leach, 285; *Rex vs. Chipchase*, id., p. 805; *Rex vs. Palmer*, id., p. 782; *Rex vs. Sharpless*, id., p. 108; *Rex vs. Aickles*, id., p. 320; *Rex vs. Harvey*, id., p. 528; *Rex vs. Charlewood*, id., p. 756; *Rex vs. Pear*, id., p. 253; *Rex vs. Tunnaid*, id., p. 255, n.; *Rex vs. Sample*, Leach, p. 470; *Rex vs. Wilkins*, id., p. 586; *Reg. vs. Cole*, 2 Cox Cr. Cas., p. 340; *Reg. vs. Thistle*, 3 id., p. 573; *Reg. vs. Hey*, 3 id., p. 582; *Reg. vs. Roberts*, id., p. 74; *Reg. vs. Janson*, id., p. 82; *Reg. vs. Brockett*, 4 id., p. 274; *Reg. vs. Mattheson*, 5 id., p. 276; *Reg. vs. Webb*, id., p. 154; *Reg. vs. Medland*, id., p. 292; *Reg. vs. Jones*, id., p. 156; *Reg. vs. Peyser*, id., p. 241; *Reg. vs. Johnson*, id., p. 372; *Reg. vs. Seward*, id., p. 295; *Reg. vs. Riley*, 6 id., p. 88; *Reg. vs. Featherstone*, id., p. 376; *Reg. vs. Cornish*, id., p. 432; 33

Eng. L. & Eq., p. 527; Reg. vs. Fitch, 7 Cox Cr. Cas., p. 269; Reg. vs. Davis, 2 Jur. (N. S.), p. 478; 36 Eng. L. & Eq., p. 607; Reg. vs. Wright, 7 Cox Cr. Cas., p. 413; 4 Jur. (N. S.), p. 313; Reg. vs. Brown, 36 Eng. L. & Eq., p. 610; 2 Jur. (N. S.), p. 192; Reg. vs. Poole, 7 Cox Cr. Cas., p. 373; Reg. vs. Williams, id., p. 355; Reg. vs. North, 8 id., p. 433; Reg. vs. Bramley, id., p. 468; Reg. vs. Thompson, 15 Law T., p. 101; Reg. vs. Guernsey, 1 Fost. & F., p. 394; Reg. vs. Gillings, id., p. 36; Reg. vs. Hooper, id., p. 85; Mourey vs. Walsh, 8 Cow., p. 238; Ross vs. People, 5 Hill, p. 294; Dayton's Case, 2 City H. Rec., p. 167; Dow's Case, id., p. 129; Lloyd's Case, id., p. 132; McClure's Case, id., p. 154; O'Terre's Case, id., p. 154; Valentine's Case, 4 id., p. 33; Bowen's Case, id., p. 46; Langley's Case, id., p. 159; Bartrons' Case, 6 id., p. 56; Cochran's Case, id., p. 62; People vs. Jackson, 3 Park Cr., p. 590; People vs. Wood, 2 id., p. 22; People vs. Call, 1 Den., p. 120; Nichols vs. People, 7 N. Y., p. 114; People vs. Schuyler, 6 Cow., p. 572; Ennis vs. State, 3 Iowa, p. 67; Spivey vs. State, 26 Ala., p. 79; Commonwealth vs. King, 9 Cush., p. 284; Commonwealth vs. White, 11 id., p. 483; Richards vs. Commonwealth, 13 Gratt., p. 803; Welsh vs. People, 17 Ill., p. 339; Farrell vs. People, 16 id., p. 506; White vs. State, 11 Tex., p. 469; Watson vs. State, 36 Miss., p. 593.

Stats. 1871-2, p. 282.

An Act to more fully define the crime of larceny.

[Approved March 6, 1872.]

[Enacting clause.]

SECTION 1. Every person who shall convert any manner of real estate, of the value of fifty dollars and upwards, into personal property, by severing the same from the realty of another, with felonious intent to and shall so steal, take, and carry away the same, shall be deemed guilty of grand larceny, and, upon conviction thereof, shall be punishable by imprisonment in the State Prison for any term not less than one year nor more than fourteen years.

SEC. 2. Every person who shall convert any manner of real estate, of the value of under fifty dollars, into personal property, by severing the same from the realty of another, with felonious intent to and shall so steal, take, and carry away the same, shall be deemed guilty of petit larceny, and, upon conviction thereof, shall be punishable by imprisonment in the County Jail for a

period not more than one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment.

Stats. 1871-2, p. 435.

An Act supplementary to an Act entitled "An Act concerning crimes and punishments," passed April sixteenth, eighteen hundred and fifty.

[Approved March 20, 1872.]

[Enacting clause.]

SECTION 1. Every person who shall feloniously steal, take, and carry away, or attempt to take, steal, and carry from any mining claim, tunnel, sluice, undercurrent, riffle box, or sulphurate machine, any gold dust, amalgam, or quicksilver, the property of another, shall be deemed guilty of grand larceny, and, upon conviction thereof, shall be punished by imprisonment in the State Prison for any term of not less than one year nor more than fourteen years.

SEC. 2. This Act shall be in force from and after its passage.

485. One who finds lost property under circumstances which give him knowledge of or means of inquiry as to the true owner, and who appropriates such property to his own use, or to the use of another person not entitled thereto, without first making reasonable and just efforts to find the owner and restore the property to him, is guilty of larceny.

Larceny
of lost
property.

Political
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To
3152

NOTE.—See *People vs. Anderson*, 14 Johns., p. 294; *State vs. McCann*, 19 Miss., p. 249; *Tanner's Case*, 14 Gratt., p. 635. See *Political Code Cal.*, "Lost property," Secs. 3136-3142. See *Civil Code Cal.*, "Finder," Secs. 1864-1872, and notes.

486. (§§ 60, 61.) Larceny is divided into two degrees, the first of which is termed grand larceny; the second, petit larceny.

Grand
and petit
larceny.

NOTE.—See note to Sec. 484, ante.

487. (§ 60.) Grand larceny is larceny committed in either of the following cases:

Grand
larceny
defined.

1. When the property taken is of a value exceeding fifty dollars.

2. When the property is taken from the person of another.

3. When the property taken is a horse, mare, gelding, cow, steer, bull, calf, mule, jack, jenny, goat, sheep, or hog.

NOTE.—Stats. 1856, p. 219, Sec. 7; 1868, p. 461, Sec. 1; 1870, p. 777, Sec. 1. See note to Sec. 484, ante.

Petit
larceny.

488. (§ 61.) Larceny in other cases is petit larceny.

NOTE.—Stats. 1856, p. 219, Sec. 8. See note to Sec. 484, ante.

Punish-
ment of
grand
larceny.

489. Grand larceny is punishable by imprisonment in the State Prison for not less than one nor more than ten years.

NOTE.—See notes to Secs. 460 and 484.

Punish-
ment of
petit
larceny.

490. Petit larceny is punishable by fine not exceeding five hundred dollars, or by imprisonment in the County Jail not exceeding six months, or both.

. NOTE.—Stats. 1856, p. 219, Sec. 8.

Dogs
property.

491. Dogs are property, and of the value of one dollar each, within the meaning of the terms “property” and “value,” as used in this Chapter.

NOTE.—Stats. 1860, p. 70, Sec. 1.

Larceny of
written in-
struments.

492. (§ 62.) If the thing stolen consists of any evidence of debt, or other written instrument, the amount of money due thereupon, or secured to be paid thereby, and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property the title to which is shown thereby, or the sum which might be recovered in the absence thereof, is the value of the thing stolen.

NOTE.—Stats. 1856, p. 219, Sec. 9. Lottery tickets being prohibited to be sold or issued in this State, are, of course, not included in this section as property.

493. If the thing stolen is any ticket or other paper or writing entitling or purporting to entitle the

holder or proprietor thereof to a passage upon any railroad or vessel or other public conveyance, the price at which tickets entitling a person to a like passage are usually sold by the proprietors of such conveyance is the value of such ticket, paper, or writing.

Value of
passage
tickets.

494. All the provisions of this Chapter apply where the property taken is an instrument for the payment of money, evidence of debt, public security, or passage ticket, completed and ready to be issued or delivered, although the same has never been issued or delivered by the makers thereof, to any person as a purchaser or owner.

Written in-
struments
completed
but not
delivered.

495. The provisions of this Chapter apply where the thing taken is any fixture or part of the realty, and is severed at the time of the taking, in the same manner as if the thing had been severed by another person at some previous time.

Severing
and
removing
part of
the realty
declared
larceny.

NOTE.—See Stats. 1871-2, p. 282, cited in note to Sec. 484, ante. This and the three preceding sections correspond with the N. Y. Penal Code.

496. Every person who, for his own gain, or to prevent the owner from again possessing his property, buys or receives any personal property, knowing the same to have been stolen, is punishable by imprisonment in the State Prison not exceeding five years, or in the county jail not exceeding six months, or by both; and it shall be presumptive evidence that such property

Receiver
of stolen
property.

NOTE.—This section is founded upon Section 63 of the Crimes and Punishment Act (Stats. 1850, p. 229), which contained a provision that "every such person may be tried, convicted, and punished, as well before as after the trial of his principal," which is transferred to Part II of this Code "Of Criminal Procedure."—See Secs. 971, 972, post.

497. Every person who, in another State or country, steals the property of another, or receives such property knowing it to have been stolen, and brings

Larceny
committed
and stolen
property
received
out of
this State.

the same into this State, may be convicted and punished in the same manner as if such larceny or receiving had been committed in this State.

NOTE.—See Stats. 24 and 26 Vict., Chap. 96, Sec. 114.

Stealing
gas.

498. Every person who, with intent to injure or defraud, makes or causes to be made any pipe, tube, or other instrument, and connects the same, or causes it to be connected, with any main, service pipe, or other pipe for conducting or supplying illuminating gas, in such manner as to supply illuminating gas to any burner or orifice, by or at which illuminating gas is consumed, around or without passing through the meter provided for the measuring and registering the quantity consumed, or in any other manner so as to evade payment therefor, and every person who, with like intent, injures or alters any gas meter or obstructs its action, is guilty of a misdemeanor.

NOTE.—Founded upon Sections 1 and 2 of an Act for the protection of gas light companies.—Stats. 1859, p. 309. Reg. vs. White, 6 Cox Cr. Cas., p. 213.

Stealing
water.

499. Every person who, with intent to injure or defraud, connects or causes to be connected, any pipe, tube, or other instrument, with any main, service pipe, or other pipe, or conduit or flume for conducting water, for the purpose of taking water from such main, service pipe, conduit or flume, without the knowledge of the owner thereof, and with intent to evade payment therefor, is guilty of a misdemeanor.

NOTE.—Stats. 1861, p. 533, Secs. 1, 2, 3.

Larceny of
goods saved
from fire
in San
Francisco.

500. Every person who, in the City and County of San Francisco, saves from fire or from a building endangered by fire, any property, and for two days thereafter corruptly neglects to notify the owner or Fire Marshal thereof, is punishable by imprisonment

in the State Prison for not less than one nor more than ten years.

NOTE.—See Sec. 3343 and note, Political Code Cal.

501. Every person who purchases or receives in pledge or by way of mortgage, from any person under the age of sixteen years, any junk, metal, mechanical tools, or implements, is guilty of a misdemeanor.

Purchasing or receiving in pledge junk, etc., of minors, misdemeanor.

502. Sections 339, 342, and 343 of THE PENAL CODE are applicable to persons carrying on the business of junk dealers, and apply to their transactions of purchase and sale, as well as to those of pledge or mortgage.

Applies Sections 339, 342, and 343 to junk dealers, etc.

NOTE.—Secs. 501 and 502 were added to the Penal Code by Stats. 1872, p. 684, approved March 28th. The sections referred to in Sec. 502 relate to registrations, etc., by pawnbrokers.

CHAPTER VI.

EMBEZZLEMENT.

SECTION 503. "Embezzlement" defined.

504. When officer, etc., of any association, guilty of embezzlement.

505. When carrier or other person having property for transportation, for hire, guilty of embezzlement.

506. When trustee, banker, etc., guilty of embezzlement.

507. When bailee, tenant, or lodger guilty of embezzlement.

508. When clerk, agent, or servant guilty of embezzlement.

509. Distinct act of taking.

510. Evidence of debt undelivered may be subject of embezzlement.

511. Claim of title a ground of defense.

512. Intent to restore the property is no defense.

513. But actual restoration is a ground for mitigation of punishment.

514. Punishment for embezzlement.

503. Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted.

"Embezzlement" defined

See Sec 332

2 Bishop
C. S. and

NOTE.—See note to Secs. 211 and 484, ante, as to the distinction between “robbery,” “larceny,” “embezzlement,” and “extortion;” also, *People vs. Belden*, 37 Cal., p. 53. In *Ex Parte Hoadley*, 31 Cal., p. 108, embezzlement was held to be a creation of the statute alone. This offense, in its commission and punishment, is intimately connected with larceny, the only difference being that specified in the case of *Belden*, supra. See, also, “Bailees,” etc., in note to Sec. 484, ante, and the cases there cited.

When
officer, etc.,
of any asso-
ciation,
guilty of
embezzle-
ment.

504. Every officer, Director, Trustee, clerk, servant, or agent of any association, society, or corporation (public or private), who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement.

NOTE.—See *People vs. Bogart*, 36 Cal., p. 247, wherein the Court say that, to avoid any question as to the offense of which the defendant may be found guilty, two counts may be used—one for a felonious *taking*, the other for a felonious *conversion*. The difference seems to be this: if a bailee takes with the intent to steal or convert, it may be charged directly as *larceny*; but if the intent to convert to his own use was conceived after the taking, it is embezzlement. In the case of *People vs. Poggi*, 19 Cal., p. 601, it was held “that the facts and circumstances which are necessary to constitute a complete offense must be stated with directness and certainty.” The circumstances constituting bailment must be charged and proved. Sec. 514, post, fixes the punishment as for larceny. 3 Chitty’s Cr. Law, p. 967; *Com. vs. Merryfield*, 4 Met., p. 468.

When
carrier or
other
person
having
property
for trans-
portation,
for hire,
guilty of
embezzle-
ment.

505. Every carrier or other person having under his control personal property for the purpose of transportation for hire, who fraudulently appropriates it to any use or purpose inconsistent with the safe keeping of such property and its transportation according to his trust, is guilty of embezzlement, whether he has broken the package in which such property is con-

tained, or has otherwise separated the items thereof, or not.

NOTE.—See notes to Secs. 484 and 504, ante.

506. Every trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, administrator, or collector, or person otherwise intrusted with or having in his control property for the use of any other person, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement.

When trustee, banker, etc., guilty of embezzlement.

NOTE.—See notes to Secs. 484 and 504, ante.

507. Every person intrusted with any property as bailee, tenant, or lodger, or with any power of attorney for the sale or transfer thereof, who fraudulently converts the same or the proceeds thereof to his own use, or secretes it or them with a fraudulent intent to convert to his own use, is guilty of embezzlement.

When bailee, tenant, or lodger guilty of embezzlement.

508. Every clerk, agent, or servant of any person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement.

When clerk, agent, or servant guilty of embezzlement.

509. A distinct act of taking is not necessary to constitute embezzlement.

Distinct act of taking.

NOTE.—People vs. Dalton, 15 Wend., p. 581.

510. Any evidence of debt, negotiable by delivery only, and actually executed, is the subject of embezzlement, whether it has been delivered or issued as a valid instrument or not.

Evidence of debt undelivered may be subject of embezzlement.

511. Upon any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title

Claim of title a ground of defense.

preferred in good faith, even though such claim is untenable. But this provision does not excuse the unlawful retention of the property of another to offset or pay demands held against him.

Intent to restore the property is no defense.

512. The fact that the accused intended to restore the property embezzled, is no ground of defense or of mitigation of punishment, if it has not been restored before an information has been laid before a magistrate, charging the commission of the offense.

But actual restoration is a ground for mitigation of punishment.

513. Whenever, prior to any information laid before a magistrate, charging the commission of embezzlement, the person accused voluntarily and actually restored or tendered restoration of the property alleged to have been embezzled, or any part thereof, such fact is not a ground of defense, but it authorizes the Court to mitigate punishment, in its discretion.

Punishment for embezzlement.

514. Every person guilty of embezzlement is punishable in the manner prescribed for feloniously stealing property of the value of that embezzled; and where the property embezzled is an evidence of debt or right of action, the sum due upon it, or secured to be paid by it, shall be taken as its value.

NOTE.—This Chapter is a considerable extension of our existing law relating to embezzlement.—Secs. 66, 71, and 72 of the Crimes and Punishment Act of 1850; Stats. 1850, p. 229, and Sec. 70 of the same Act, as amended; Stats. 1864, p. 40. It is taken from the Chapter of the New York Penal Code on the same subject, Sec. 601, et seq.

CHAPTER VII.

EXTORTION.

SECTION 518. "Extortion" defined.

519. What threats may constitute extortion.

520. Punishment of extortion in certain cases.

SECTION 521. Punishment of extortion committed under color of official right.

522. Obtaining signature by means of threats.

523. Sending threatening letters with intent to extort money, etc.

524. Attempts to extort money or property by means of verbal threats.

525. Officers of railroad companies making overcharges.

518. Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right.

"Extortion" defined.

S. 1
§ 520

NOTE.—See notes to Secs. 211, 484, and 503, ante. The Act of 1850 defined "extortion" to be the taking by any officer of a reward or fee for the discharge of duty other than that fixed by law, when so taken willfully or corruptly, or to demand such reward or fee as a condition precedent to the performance of duty.—See Sec. 107. This is doubtless a good definition of official extortion, and it was held to be constitutional in *Ryan vs. Johnson*, 5 Cal., p. 86; see *Bouv. Law Dict.*, Title "Extortion;" 4 Blackst. Com., p. 141; 1 Hawkins Pl. Cr., Chap. 68, Sec. 1; 1 Russ. Cr., p. 144. Taking a note which would be void would not constitute the offense. Money or property must be taken or received.—2 Mass., p. 523; 16 id., p. 93. To receive or take money for performance of discretionary power is extortion.—2 Burr., p. 927; *People vs. Whaley*, 6 Cow., N. Y., p. 661; 1 Caines, N. Y., p. 130; 13 Serg. & R., Penn., p. 426; 3 Penn., p. 183; 1 Yeates, Penn., p. 71; 1 Pick., p. 171. The term "extortion," in its enlarged sense, would include any oppression accompanied with colorable right; but only such extortion is punishable as is made so by statute, hence the extension of the common law term to the wrongful use of force or fear.

519. Fear, such as will constitute extortion, may be induced by a threat, either:

What threats may constitute extortion.

1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his, or member of his family; or,

2. To accuse him, or any relative of his, or member of his family, of any crime; or,

3. To expose, or impute to him or them any deformity or disgrace; or,

4. To expose any secret affecting him or them.

Punish-
ment of
extortion
in certain
cases.

520. Every person who extorts any money or other property from another, under circumstances not amounting to robbery, by means of force, or any threat, such as is mentioned in the preceding section, is punishable by imprisonment in the State Prison not exceeding five years.

521. The Act entitled "An Act to prevent extortion in office, and to enforce official duty," approved March 14, 1853, was designed to afford a remedy of a summary character against office holders who were guilty of extortion, or of neglect in the performance of official duties. Matter of J. J. Marks, 45 Cal. 199. any extortion which a dif- this Code, is

Obtaining
signature
by means
of threats.

522. Every person who, by any extortionate means, obtains from another his signature to any paper or instrument, whereby, if such signature were freely given, any property would be transferred, or any debt, demand, charge, or right of action created, is punishable in the same manner as if the actual delivery of such debt, demand, charge, or right of action were obtained.

Sending
threatening
letters
with intent
to extort
money, etc.

523. Every person who, with intent to extort any money or other property from another, sends or delivers to any person any letter or other writing, whether subscribed or not, expressing or implying, or adapted to imply, any threat such as is specified in Section 519, is punishable in the same manner as if such money or property were actually obtained by means of such threat.

Attempts
to extort
money or
property by
means of
verbal
threats.

524. Every person who unsuccessfully attempts, by means of any verbal threat, such as is specified in Section 519, to extort money or other property from another, is guilty of a misdemeanor.

NOTE.—The preceding sections of this Chapter are from the New York Penal Code, Secs. 613-619, and include our laws on the subject.

525. Every officer, agent, or employé of a railroad company who asks or receives a greater sum than is allowed by law for the carriage of passengers or freight, is guilty of a misdemeanor.

Officers of railroad companies making over-charges.

NOTE.—See Civil Code Cal., Sec. 489; id., Sec. 2174, rights and liabilities of common carriers; and Sec. 2168 and notes, who are common carriers. Common carriers of persons and regulations.—Id., Secs. 2180-2191; of property, id., Secs. 2194-2203, and notes. In recent cases in New York, New Jersey, and Pennsylvania the right of common carriers—*railroads*—to refuse to recognize all tickets *sold* as stop-over tickets is seriously questioned, if not denied. If this is the established rule, then a query arises whether it would not be gross extortion to exact pay a *second* time for a *single trip*, in cases where the trip is not pursued without interruption. This should be the rule, and it is not certain that it is not so already.

CHAPTER VIII.

FALSE PERSONATION AND CHEATS.

SECTION 528. Marrying under false personation.

529. Falsely personating another in other cases.

530. Receiving property in a false character.

531. Fraudulent conveyances.

532. Obtaining money by false pretenses and by false reports of wealth, etc.

533. Selling land twice.

534. Married person selling lands under false representations.

535. Mock auction.

528. (§ 90.) Every person who falsely personates another, and in such assumed character marries or pretends to marry, or to sustain the marriage relation towards another, with or without the connivance of such other, is guilty of a felony.

Marrying under false personation

NOTE.—Such marriage is voidable.—Sec. 58, Civil Code Cal. The word “personate” alone, in its ordinary definition, would probably include all that the prefix “falsely” imports. Still, it is used in the Penal Code N. Y., Sec. 620. Our statute was “falsely represent or personate.” Here the prefix to “represent” was necessary. The expression of the text, however, being similarly used in different States, will enable the Courts to have less, if any, trouble in expounding it. Bouv., in his L. Dict., “Personate,” says at common law personating another for the purpose of *fraud* was only a misdemeanor. The text, properly regarding a fraud in the solemn engagement of the marital relation as of a very grave character, affixes to it a correspondingly heavy punishment, greater even than the N. Y. Code.

Falsely
personating
another in
other cases.

529. (§ 90.) Every person who falsely personates another, and in such assumed character, either:

1. Becomes bail or surety for any party in any proceeding whatever, before any Court or officer authorized to take such bail or surety; or,

2. Verifies, publishes, acknowledges, or proves, in the name of another person, any written instrument, with intent that the same may be recorded, delivered, and used as true; or,

3. Does any other act whereby, if it were done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, or whereby any benefit might accrue to the party personating, or to any other person;

—Is punishable by imprisonment in the County Jail not exceeding two years, or by fine not exceeding five thousand dollars.

NOTE.—See note to preceding section. Here the punishment is like that of the N. Y. Code.

Receiving
property in
a false
character.

530. (§ 91.) Every person who falsely personates another, and in such assumed character receives any money or property, knowing that it is intended to be delivered to the individual so personated, with intent to convert the same to his own use, or to that of

another person, or to deprive the true owner thereof, is punishable in the same manner and to the same extent as for larceny of the money or property so received.

NOTE.—See note to Sec. 538.

531. (§ 129.) Every person who is a party to any fraudulent conveyance of any lands, tenements, or hereditaments, goods or chattels, or any right or interest issuing out of the same, or to any bond, suit, judgment, or execution, contract or conveyance, had, made, or contrived with intent to deceive and defraud others, or to defeat, hinder, or delay creditors or others of their just debts, damages, or demands; or who, being a party as aforesaid, at any time wittingly and willingly puts in, uses, avows, maintains, justifies, or defends the same, or any of them, as true, and done, had, or made in good faith, or upon good consideration, or aliens, assigns, or sells any of the lands, tenements, hereditaments, goods, chattels, or other things before mentioned, to him or them conveyed as aforesaid, or any part thereof, is guilty of a misdemeanor.

Fraudulent conveyances.

§

NOTE.—“Actual fraud” defined.—Sec. 1572, and note, Civil Code Cal; see, also, “constructive,” id., Sec. 1573.

532. (§§ 130, 131.) Every person who knowingly and designedly, by false or fraudulent representation or pretenses, defrauds any other person of money or property, or who causes or procures others to report falsely of his wealth or mercantile character, and by thus imposing upon any person obtains credit, and thereby fraudulently gets into possession of money or property, is punishable by imprisonment in the County Jail, not exceeding one year, and by fine not exceeding three times the value of the money or property so obtained.

Obtaining money by false pretenses and by false reports of wealth, etc.

533. (§ 132.) Every person who, after once selling, bartering, or disposing of any tract of land or

Selling
land twice.

town lot, or after executing any bond or agreement for the sale of any land or town lot, again willfully and with intent to defraud previous or subsequent purchasers, sells, barter, or disposes of the same tract of land or town lot, or any part thereof, or willfully and with intent to defraud previous or subsequent purchasers, executes any bond or agreement to sell, barter, or dispose of the same land or lot, or any part thereof, to any other person for a valuable consideration, is punishable by imprisonment in the State Prison not less than one nor more than ten years.

NOTE.—This section is founded on Section 132 of the Crimes and Punishment Act of 1850. The words “knowingly and fraudulently” are stricken out, and the phrase “willfully and with intent to defraud previous or subsequent purchasers” inserted in lieu thereof. Section 132 was evidently intended to embody the provisions of the statute of 27 Eliz., Chap. 4, which made it a criminal offense for any person to sell or convey land and the like *with intent to defraud previous or subsequent purchasers*, and proceeded upon the theory that either of the purchasers may be defrauded by the second sale. The substitution of the word “fraudulently” for the precise words of the English statute, which are here restored to the section, rendered Section 132 obscure, and made it uncertain as to whether the fraud necessary to constitute the offense must move against previous or subsequent purchasers, whilst, if directed against either, the case fell within the mischief the statute intended to guard against. This want of precision in Section 132 has already been the subject of judicial observation in this State (*People vs. Garnett*, 35 Cal., p. 470), and it has been held, Chief Justice Rhodes expressing no opinion, that the section must receive the same construction as the English statute cited; therefore, it was manifestly proper that the language of the latter statute should be restored.

533. The giving of a mortgage upon land by a party who has already conveyed his title to another by deed, is not disposing of the land within the meaning of the statute, which makes it a felony to fraudulently sell land after having once sold it. *People v. Cox*, 45 Cal. 342.

Married
person
selling
lands under
false repre-
sentations.

534. Every married person who falsely and fraudulently represents himself or herself as competent to sell or mortgage any real estate, to the validity of which sale or mortgage the assent or concurrence of his wife or her husband is necessary, and under such

representations willfully conveys or mortgages the same, is guilty of felony.

NOTE.—Founded on the Act of April 27th, 1863, to prevent the fraudulent sale or incumbrance of real estate by married women (Stats. 1863, p. 750, Sec. 1), here extended to include the husband, and to prevent fraud in the attempted disposition of the homestead.

535. Every person who obtains any money or property from another, or obtains the signature of another to any written instrument, the false making of which would be forgery, by means of any false or fraudulent sale of property or pretended property, by auction, or by any of the practices known as mock auctions, is punishable by imprisonment in the State Prison not exceeding three years, or in the County Jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment; and, in addition thereto, forfeits any license he may hold as auctioneer, and is forever disqualified from receiving a license to act as auctioneer within this State.

NOTE.—See "Auctioneers," Sec. 3284, et seq., Pol. Code Cal.

New section 536 added 1880

CHAPTER IX.

FRAUDULENTLY FITTING OUT AND DESTROYING VESSELS.

SECTION 539. Captain or other officer willfully destroying vessel, etc.

540. Other persons willfully destroying vessel, etc.

541. Making false manifest, etc.

539. Every captain or other officer or person in command or charge of any vessel, who, within this State, willfully wrecks, sinks, or otherwise injures or destroys such vessel, or any cargo in such vessel, or willfully permits the same to be wrecked, sunk, or otherwise injured or destroyed, with intent to prejudice or defraud any other person, is punishable by

Captain or other officer willfully destroying vessel, etc.

imprisonment in the State Prison not less than three years.

NOTE.—Injuring or destroying vessels upon the high seas is provided for by various Acts of Congress.—See the Acts collected, Brightly's Dig., pp. 209-211. The above section is, therefore, limited to acts committed within this State.

Other
persons
willfully
destroying
vessel, etc.

540. Every person, other than such as are embraced within the last section, who is guilty of any act therein specified, is punishable by imprisonment in the State Prison for a term not exceeding ten years.

Making
false
manifest,
etc.

541. Every person guilty of preparing, making, or subscribing any false or fraudulent manifest, invoice, bill of lading, ship's register, or protest, with intent to defraud another, is punishable by imprisonment in the State Prison not exceeding three years.

NOTE.—This Chapter is similar to the New York Penal Code, p. 227.

CHAPTER X.

FRAUDULENTLY KEEPING POSSESSION OF WRECKED PROPERTY.

SECTION 544. Detaining wrecked property after salvage paid.

545. Unlawfully taking or having possession of wrecked property.

Detaining
wrecked
property
after
salvage
paid.

544. Every person who keeps any wrecked property, or the proceeds thereof, after the salvage and expenses chargeable thereon have been agreed to or adjusted, and the amount thereof has been paid to him, is punishable by fine not exceeding one thousand dollars, or by imprisonment in the County Jail not exceeding one year, or both.

NOTE.—Stats. 1850, p. 173, Sec. 24. See Political Code Cal., "Wrecks and wrecked property," Secs. 2403-2418, and notes.

545. Every person who takes away any goods from any stranded vessel, or any goods cast by the sea upon the land, or found in any bay or creek, or knowingly has in his possession any goods so taken or found, and does not deliver the same to the Sheriff of the county where they were found, or notify him of his readiness to do so within thirty days after the same have been taken by him, or have come into his possession, is guilty of a misdemeanor.

Unlawfully taking or having possession of wrecked property.

NOTE.—Stats. 1850, p. 173, Sec. 25. See Secs. 2403–2418, Pol. Code Cal.

CHAPTER XI.

FRAUDULENT DESTRUCTION OF PROPERTY INSURED.

SECTION 548. Burning or destroying property insured.

549. Presenting false proofs in support of a claim upon policy of insurance.

548. Every person who willfully burns, or in any other manner injures or destroys any property which is at the time insured against loss or damage by fire or by any other casualty, with intent to defraud or prejudice the insurer, whether the same be the property of or in possession of such person or of any other, is punishable by imprisonment in the State Prison not less than one nor more than ten years.

Burning or destroying property insured.

NOTE.—This section is substituted for Sec. 7 of the Act of April 19th, 1856 (Stats. 1856, p. 182), and is extended to include every injury to property insured.—See notes to Secs. 447, 452, et seq., ante; see “Insurance defined,” Sec. 2527, Civil Code; subjects, Sec. 2531, et al., id.

549. Every person who presents or causes to be presented any false or fraudulent claim, or any proof in support of any such claim, upon any contract of insurance for the payment of any loss, or who pre-

Presenting false proofs in support of a claim upon policy of insurance.

pares, makes, or subscribes any account, certificate of survey, affidavit, or proof of loss, or other book, paper, or writing with intent to present or use the same, or to allow it to be presented or used in support of any such claim, is punishable by imprisonment in the State Prison not exceeding three years, or by a fine not exceeding one thousand dollars, or by both.

NOTE.—See notes to Secs. 447–452, ante; see “Notice of Loss,” Civil Code, Secs. 2633–2637.

CHAPTER XII.

FALSE WEIGHTS AND MEASURES.

SECTION 552. “False weight” and “measure” defined.

553. Using false weights or measures.

554. Stamping false weight, measure, or tare on casks or packages.

“False weight” and “measure” defined.

552. A false weight or measure is one which does not conform to the standard established by the laws of the United States of America.

NOTE.—Based on the Act of April 4th, 1861 (Stats. 1861, p. 86), establishing a standard of weights and measures.—See Political Code Cal., “Weights and Measures,” Secs. 3209–3223, and notes. Our statute recognizes the superiority of the Act of Congress, hence our statute must be construed as subordinate thereto, the Act of Congress given in note to Sec. 3209 of the Political Code being approved July 28th, 1866, and our statute, on which the sections of the Code are based, was approved April 4th, 1861, p. 86.

Using false weights or measures.

553. Every person who uses any weight or measure, knowing it to be false, by which use another is defrauded or otherwise injured, is guilty of a misdemeanor.

NOTE.—Founded upon Sec. 12 of the Act cited in note to preceding section, and Sec. 133 of the Crimes and Punishment Act of 1850 (Stats. 1850, p. 229.)

554. Every person who knowingly marks or stamps false or short weight or measure, or false tare, on any cask or package, or knowingly sells, or offers for sale, any cask or package so marked, is guilty of a misdemeanor.

Stamping false weight, measure, or tare on casks or packages.

CHAPTER XIII.

FRAUDULENT INSOLVENCIES BY CORPORATIONS, AND OTHER FRAUDS IN THEIR MANAGEMENT.

SECTION 557. Frauds in subscriptions for stock of corporations.

- 558. Frauds in procuring organization of corporation, or increasing its capital.
- 559. Unauthorized use of names in prospectus, etc.
- 560. Misconduct of Directors of stock corporations.
- 561. Savings bank officer overdrawing his account.
- 562. Receiving deposits in insolvent banks.
- 563. Frauds in keeping accounts in books of corporations.
- 564. Officer of corporation publishing false reports of its condition.
- 565. Officer of corporation to permit an inspection of its books.
- 566. Officer of railroad company contracting debt in its behalf exceeding its available means.
- 567. Debt contracted in violation of last section not invalid.
- 568. Director of a corporation presumed to have knowledge of its affairs.
- 569. Director present at meeting, when presumed to have assented to proceedings.
- 570. Director absent from meeting, when presumed to have assented to proceedings.
- 571. Foreign corporations.
- 572. "Director" defined.

557. Every person who signs the name of a fictitious person to any subscription for or agreement to take stock in any corporation existing or proposed, and every person who signs to any subscription or agreement the name of any person, knowing that such person has not means or does not intend in good faith to comply with all the terms thereof, or under any under-

Fraud in subscriptions for stock of corporations.

standing or agreement that the terms of such subscription or agreement are not to be complied with or enforced, is guilty of a misdemeanor.

NOTE.—This section is intended to reach a species of fraud frequently practiced in the organization of corporations.—See *Palmer vs. Lawrence*, 3 Sandf., p. 161; 1 Seld., p. 389; see Civil Code Cal., Secs. 292, subscription to articles; 293, subscription to the capital stock; 295, oath to subscription.

Frauds in
procuring
organiza-
tion of
corpora-
tion, or
increasing
its capital.

558. Every officer, agent, or clerk of any corporation, or of any persons proposing to organize a corporation, or to increase the capital stock of any corporation, who knowingly exhibits any false, forged, or altered book, paper, voucher, security, or other instrument of evidence to any public officer or board authorized by law to examine the organization of such corporation, or to investigate its affairs, or to be allowed an increase of its capital, with intent to deceive such officer or board in respect thereto, is punishable by imprisonment in the State Prison not less than three nor more than ten years.

NOTE.—See Civil Code Cal., “Corporations,” Sec. 316; also, formation of, Secs. 283-320, id.; corporate stock, Secs. 322-349, id.; records, Secs. 377, 378, id.; increasing, etc., stock, Sec. 359, id. For different kinds of corporations and subscriptions to their capital stock, see Titles in Index to pp. 81-195, being Part IV, Div. I, id., Vol. I.

Unauthor-
ized use of
name in
prospectus,
etc.

559. Every person who, without being authorized so to do, subscribes the name of another to or inserts the name of another in any prospectus, circular, or other advertisement, or announcement of any corporation or joint stock association, existing or intended to be formed, with intent to permit the same to be published, and thereby to lead persons to believe that the person whose name is so subscribed is an officer, agent, member or promoter of such corporation or association, is guilty of a misdemeanor.

NOTE.—Civil Code Cal., subscription, Secs. 292, 293; see note to Sec. 558, ante.

560. Every director of any stock corporation who concurs in any vote or act of the directors of such corporation or any of them, by which it is intended, either :

Misconduct
of Directors
of stock
corpora-
tions.

1. To make any dividend, except from the surplus profits arising from the business of the corporation, and in the cases and manner allowed by law; or,

2. To divide, withdraw, or in any manner, except as provided by law, pay to the stockholders, or any of them, any part of the capital stock of the corporation; or,

3. To discount or receive any note or other evidence of debt in payment of any installment actually called in and required to be paid, or with the intent to provide the means of making such payment; or,

4. To receive or discount any note or other evidence of debt, with the intent to enable any stockholder to withdraw any part of the money paid in by him, or his stock; or,

5. To receive from any other stock corporation, in exchange for the shares, notes, bonds, or other evidences of debt of their own corporation, shares of the capital stock of such other corporation, or notes, bonds, or other evidences of debt issued by such other corporation;

—Is guilty of a misdemeanor.

NOTE.—See “Corporations,” Civil Code, and note to Sec. 558, ante. In point, see id., Sec. 309.

561. Every officer, agent, teller, or clerk of any savings bank, who knowingly overdraws his account with such bank, and thereby wrongfully obtains the money, note, or funds of such bank, is guilty of a misdemeanor.

Savings
bank officer
overdraw-
ing his
account.

562. Every officer, agent, teller, or clerk of any bank, and every individual banker, or agent, teller, or clerk of any individual banker, who receives any

Receiving
deposits in
insolvent
banks.

deposits, knowing that such bank, or association, or banker is insolvent, is guilty of a misdemeanor.

NOTE.—See Nixon's Dig. L. of N. J., p. 372, Sec. 4; State vs. Stimson, 4 Zab., p. 478.

Frauds in
keeping
accounts in
books of
corpora-
tions.

563. Every director, officer, or agent of any corporation or joint stock association, who knowingly receives or possesses himself of any property of such corporation or association, otherwise than in payment of a just demand, and who, with intent to defraud, omits to make, or to cause or direct to be made, a full and true entry thereof in the books or accounts of such corporation or association, and every director, officer, agent, or member of any corporation or joint stock association who, with intent to defraud, destroys, alters, mutilates, or falsifies any of the books, papers, writings, or securities belonging to such corporation or association, or makes, or concurs in making, any false entries, or omits, or concurs in omitting to make any material entry in any book of accounts, or other record or document kept by such corporation or association, is punishable by imprisonment in the State Prison not less than three nor more than ten years, or by imprisonment in a County Jail not exceeding one year, and a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

NOTE.—See note to Sec. 558, ante, Stats. 24 and 25 Vict., Chap. 96, Sec. 82.

Officer of
corporation
publishing
false
reports
of its
condition.

564. Every director, officer, or agent of any corporation or joint stock association, who knowingly concurs in making or publishing any written report, exhibit, or statement of its affairs or pecuniary condition, containing any material statement which is false, other than such as are mentioned in this Chapter, is guilty of a misdemeanor.

NOTE.—See Sec. 316, Civil Code Cal.; also, Cross vs. Sackett, 6 Abbott's Pr. R., p. 247, and numerous cases there cited; also, Harper vs. Chamberlain, 11 Abbott's Pr., p. 234.

565. Every officer or agent of any corporation, having or keeping an office within this State, who has in his custody or control any book, paper, or document of such corporation, and who refuses to give to a stockholder or member of such corporation, lawfully demanding, during office hours, to inspect or take a copy of the same, or of any part thereof, a reasonable opportunity so to do, is guilty of a misdemeanor.

Officer of corporation to permit an inspection of its books.

NOTE.—See Secs. 377, 378, Civil Code Cal.; also, Secs. 382, 383. Stock and transfer books to be kept open to inspection, and examination of affairs by officers of the State and the Legislature.—Cotheal vs. Brouwer, 1 Seld., p. 562.

566. Every officer, agent, or stockholder of any railroad company, who knowingly assents to or has any agency in contracting any debt by or on behalf of such company, unauthorized by a special law for the purpose, the amount of which debt, with other debts of the company, exceeds its available means for the payment of its debts, in its possession, under its control, and belonging to it at the time such debt is contracted, including its bona fide and available stock subscriptions, and exclusive of its real estate, is guilty of a misdemeanor.

Officer of railroad company contracting debt in its behalf exceeding its available means.

NOTE.—See Civil Code, Secs. 309, 456, 457.

567. The last section does not affect the validity of a debt created in violation of its provisions, as against the company.

Debt contracted in violation of last section not invalid.

568. Every director of a corporation or joint-stock association is deemed to possess such a knowledge of the affairs of his corporation as to enable him to determine whether any act, proceeding, or omission of its directors is a violation of this Chapter.

Director of a corporation presumed to have knowledge of its affairs

569. Every director of a corporation or joint stock association who is present at a meeting of the directors at which any act, proceeding, or omission of such di-

Director present at meeting, when presumed to have assented to proceedings.

rectors, in violation of this Chapter occurs, is deemed to have concurred therein, unless he at the time causes or in writing requires his dissent therefrom to be entered in the minutes of the directors.

NOTE.—See Secs. 309, 317, Civil Code Cal. Present, and dissenting from action.—Sec. 377, id.

Director
absent
from
meeting,
when
presumed
to have
assented to
proceed-
ings.

570. Every director of a corporation or joint stock association, although not present at a meeting of the directors at which any act, proceeding, or omission of such directors, in violation of this Chapter occurs, is deemed to have concurred therein, if the facts constituting such violation appear on the records or minutes of the proceedings of the Board of Directors, and he remains a director of the same company for six months thereafter, and does not within that time cause, or in writing require, his dissent from such illegality to be entered in the minutes of the directors.

Foreign
corpora-
tions.

571. It is no defense to a prosecution for a violation of the provisions of this Chapter, that the corporation was one created by the laws of another State, Government, or country, if it was one carrying on business or keeping an office therefor within this State.

“Director”
defined.

572. The term “Director,” as used in this Chapter, embraces any of the persons having by law the direction or management of the affairs of a corporation, by whatever name such persons are described in its charter or known by law.

NOTE.—Most of the provisions of this Chapter, which are taken from the New York Penal Code (Secs. 645-668), are new to our laws. The great importance that corporations are assuming in the country, the almost absolute power of the Directors over the property of the corporation, and the numerous frauds that are perpetrated upon the community as well as upon shareholders, point the necessity for stringent penal enactments.

CHAPTER XIV.

FRAUDULENT ISSUE OF DOCUMENTS OF TITLE TO MERCHANDISE.

SECTION 577. Issuing fictitious bills of lading, etc.

578. Issuing fictitious warehouse receipts.

579. Erroneous bills of lading or receipts issued in good faith excepted.

580. Duplicate receipts must be marked "duplicate."

581. Selling, hypothecating, or pledging property received for transportation or storage.

582. Bill of lading or receipt issued by warehouseman must be canceled on redelivery of the property.

583. Property demanded by process of law.

577. Every person, being the master, owner, or agent of any vessel, or officer or agent of any railroad, express, or transportation company, or otherwise being or representing any carrier, who delivers any bill of lading, receipt, or other voucher, by which it appears that any merchandise of any description has been shipped on board any vessel, or delivered to any railroad, express, or transportation company or other carrier, unless the same has been so shipped or delivered, and is at the time actually under the control of such carrier, or the master, owner, or agent of such vessel, or of some officer or agent of such company, to be forwarded as expressed in such bill of lading, receipt, or voucher, is punishable by imprisonment in the State Prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both.

Issuing
fictitious
bills of
lading, etc.

NOTE.—Bill of lading defined, Civil Code Cal., Sec. 2126, and note: "An instrument in writing, signed by a carrier or his agent, describing the freight so as to identify it, stating the name of the consignor, the terms of the contract for carriage, and agreeing or directing that the freight be delivered to the order or assigns of a specified person at a specified place."

578. Every person carrying on the business of a warehouseman, wharfinger, or other depository of prop-

Issuing
fictitious
warehouse
receipts.

erty, who issues any receipt, bill of lading, or other voucher for any merchandise of any description, which has not been actually received upon the premises of such person, and is not under his actual control at the time of issuing such instrument, whether such instrument is issued to a person as being the owner of such merchandise or as security for any indebtedness, is punishable by imprisonment in the State Prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both.

NOTE.—*Warehouseman* is a person who receives goods and merchandise to be stored in his warehouse for hire.—Bouv. L. Dict., Vol. 2, p. 650. *Wharfinger*, one who owns or keeps a wharf for the purpose of receiving and shipping merchandise to and from it for hire.—Id., p. 660. *Receipt*, a written acknowledgment of * * * delivery of chattels.—See, also, *Hooper vs. Wells, Fargo & Co.*, 27 Cal., p. 11. *Other depositary* includes common carriers, forwarders, innkeepers, pawnbrokers, pledgees, etc.; it means one who receives personal property to be kept for the benefit of the depositor or a third party.—Civil Code, Sec. 1814.

Erroneous
bills of
lading or
receipts
issued in
good faith
excepted.

579. No person can be convicted of an offense under the last two sections by reason that the contents of any barrell, box, case, cask, or other vessel or package mentioned in the bill of lading, receipt, or other voucher did not correspond with the description given in such instrument of the merchandise received, if such description corresponded substantially with the marks, labels, or brands upon the outside of such vessel, or package, unless it appears that the accused knew that such marks, labels, or brands were untrue.

NOTE.—Div. III, Part IV, Title III, "Deposit," Civil Code Cal., Vol. 1, treats of deposits of every character.

Duplicate
receipts
must be
marked
"dupli-
cate."

580. Every person mentioned in this Chapter, who issues any second or duplicate receipt or voucher, of a kind specified therein, at a time while any former receipt or voucher for the merchandise specified in

such second receipt is outstanding and uncanceled, without writing across the face of the same the word "Duplicate," in a plain and legible manner, is punishable by imprisonment in the State Prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both.

NOTE.—Sec. 2130, and note, Civil Code Cal., provides for issuing several receipts or bills of lading; this is, of course, not prohibited by this section.

581. Every person mentioned in this Chapter, who sells, hypothecates, or pledges any merchandise for which any bill of lading, receipt, or voucher has been issued by him, without the consent in writing thereto of the person holding such bill, receipt, or voucher, is punishable by imprisonment in the State Prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both.

Selling, hypothecating, or pledging property received for transportation or storage.

NOTE.—Nothing in this section is intended to prevent the disposal of "unclaimed property," as provided in the Political Code Cal., by Secs. 3152-3157.

~~582. Every person mentioned in this Chapter, who delivers to another any merchandise for which any bill of lading, receipt, or voucher has been issued, unless such receipt or voucher bore upon its face the words "Not negotiable," plainly written or stamped, or unless such receipt is surrendered to be canceled at the time of such delivery, or unless, in the case of a partial delivery, a memorandum thereof is indorsed upon such receipt or voucher, is punishable by imprisonment in the State Prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both.~~

Bill of lading or receipt issued by warehouseman must be canceled on redelivery of the property.

NOTE.—See "negotiability," etc., of bills of lading, Secs. 2127, 2128, Civil Code Cal.

583. The last two sections do not apply where property is demanded or sold by virtue of process of law.

Property demanded by process of law.

NOTE.—This Chapter corresponds with the New York Penal Code, p. 254.

CHAPTER XV.

MALICIOUS INJURIES TO RAILROAD BRIDGES, HIGHWAYS,
BRIDGES, AND TELEGRAPHS.

SECTION 587. Injuries to railroads and railroad bridges.

588. Injuries to highways, private ways, and bridges.

589. Injuries to toll houses and gates.

590. Injuries to milestones and guide boards.

591. Injuring telegraph lines.

Injuries to
railroads
and
railroad
bridges.587. Every person who maliciously, either:

1. Removes, displaces, injures, or destroys any part of any railroad, whether for steam or horse cars, or any track of any railroad, or any branch or branchway, switch, turnout, bridge, viaduct, culvert, embankment, station house, or other structure or fixture, or any part thereof, attached to or connected with any railroad; or,

2. Places any obstruction upon the rails or track of any railroad, or of any switch, branch, branchway, or turnout connected with any railroad;

—Is punishable by imprisonment in the State Prison not exceeding five years, or in the County Jail not less than six months.

NOTE.—N. Y. P. C., Sec. 690; Stats. 1861, p. 625, Sec. 53.

Injuries to
highways,
private
ways, and
bridges.

588. Every person who maliciously digs up, removes, displaces, breaks, or otherwise injures or destroys any public highway or bridge, or any private way laid out by authority of law, or bridge upon such highway or private way, is punishable by imprisonment in the State Prison not exceeding five years, or in the County Jail not exceeding one year.

NOTE.—N. Y. P. C., Sec. 692; Stats. 1861, p. 397, Sec. 20; 1861, p. 625, Sec. 53; 1855, p. 192, Secs. 12, 13. Political Code Cal., Secs. 3753-3755

Injuries to
toll houses
and gates.

589. Every person who maliciously injures or destroys any toll house or turnpike gate, is guilty of a misdemeanor.

See
2750+
2350
Political
Code

NOTE.—N. Y. P. C., Sec. 693; Stats. 1853, p. 176, Sec. 32. Political Code Cal., Secs. 2749, 2750, 2751–2753.

590. Every person who maliciously removes or injures any mile board, post, or stone, or guide post, or any inscription on such, erected upon any highway, is guilty of a misdemeanor.

Injuries to
milestones
and guide
boards.

Pol. Code
2757

NOTE.—N. Y. P. C., Sec. 694; Stats. 1853, p. 176, Sec. 32; Political Code Cal., Sec. 2646, Subd. 9—mile stones or posts, and guide posts; also, id., Secs. 2795, 2796.

591. Every person who maliciously takes down, removes, injures, or obstructs any line of telegraph, or any part thereof, or appurtenance or apparatus connected therewith, or severs any wire thereof, is guilty of a misdemeanor.

Injuring
telegraph
lines.

NOTE.—Stats. 1862, p. 288, Sec. 8; N. Y. P. C., Sec. 695.

592 *New Section*

TITLE XIV.

MALICIOUS MISCHIEF.

SECTION 594. Malicious mischief in general, defined.

595. Specifications in following sections not restrictive of last section.

596. Poisoning cattle.

597. Killing, maiming, or torturing animals.

598. Killing, etc., birds in cemeteries.

599. Killing seals and sea lions within one mile of Cliff House.

600. Burning buildings and other property not the subject of arson.

601. Using gunpowder, etc., in destroying or injuring any building.

602. Malicious injuries to freehold.

603. Limitation upon the operations of the preceding section.

604. Injuries to standing crops, etc.

605. Removing, defacing, or altering landmarks.

606. Destroying or injuring jails.

SECTION 607. Destroying or injuring bridges, dams, levees, water dams, etc.

608. Burning or injuring rafts. Setting adrift vessels.

609. Removing buoys and beacons.

610. Masking or removing signal lights, or exhibiting false lights.

611. Obstructing navigable streams.

612. Depositing sand, dust, etc., in Humboldt Bay.

613. Throwing overboard ballast, or otherwise obstructing the navigation of any harbor, etc.

614. Mooring vessels to buoys.

615. Injuries to signals, monuments, etc., erected in United States Coast Survey.

616. Destroying or tearing down notices, etc., before expiration of time for which they were to remain set up.

617. Injuring or destroying written instrument.

618. Opening or publishing sealed letters.

619. Disclosing contents of telegraphic message.

620. Altering telegraphic messages.

621. Opening sealed envelopes containing telegraphic dispatches.

622. Injuring works of art or improvements in any city, town, or village.

623. Destroying works of literature, etc., in public libraries.

624. Breaking or obstructing gas or water pipes, etc.

625. Drawing water from works after they have been closed.

Malicious mischief in general, defined.

594. Every person who maliciously injures or destroys any real or personal property not his own, in cases otherwise than such as are specified in this Code, is guilty of a misdemeanor.

NOTE.—Subd. 4, Sec. 7, ante, declares: “The terms ‘malice’ and ‘maliciously’ (to) import a wish to vex, annoy, or injure another person, established either by proof or presumption of law.” Says Bouv. in his Law Dict., vol. 2, p. 92, of the subject of this Title—malicious mischief—it is “an expression applied to the wanton or reckless destruction of property and the willful perpetration of injury to the person.” Willfully doing an act prohibited by law, and for which the law makes no excuse, does not sufficiently define the term “malicious mischief.” To convict of the offense, as defined by Bouv., supra, it is said that the jury must find the injury to be done with a spirit of wanton cruelty or wicked revenge, and it is so held in Massachusetts—3 Cush., p. 558; 2 Metc., p. 21; but the Code does not require so much. See definition of “maliciously,” supra. The text also includes *injury*, as well

as *destruction*. Bouv., id., supra, defines "malicious injury" to be an injury committed willfully and wantonly, or without cause.—Whart. Cr. Law, p. 226, et seq.; 2 Russ. Crimes, pp. 544, 547; 4 Shars. Blackst. Com., pp. 143, 198, 200, 206.

595. The specification of the Acts enumerated in the following sections of this Chapter is not intended to restrict or qualify the interpretation of the preceding section.

Specifica-
tions in
following
sections not
restrictive
of last
section.

596. Every person who willfully administers any poison to an animal, the property of another, or maliciously exposes any poisonous substance, with the intent that the same shall be taken or swallowed by any such animal, is punishable by imprisonment in the State Prison not exceeding three years, or in the County Jail not exceeding one year, and a fine not exceeding five hundred dollars.

Poisoning
cattle.

NOTE.—The Act of March 30, 1868 (see Stats. 1868, p. 604), "For the more effectual prevention of cruelty to animals," was expressly preserved by Sec. 19, Political Code, Subd. 8. This also effectively preserves the Act published in Stats. 1871-2, p. 393, amendatory thereof.

597. Every person who maliciously kills, maims, or wounds an animal, the property of another, or who maliciously and cruelly beats, tortures, or injures any animal, whether belonging to himself or another, is guilty of a misdemeanor.

Killing,
maining,
or torturing
animals.

NOTE.—Stats. 1855, p. 105, Sec. 4.

598. Every person who, within any public cemetery or burying ground, kills, wounds, or traps any bird, or destroys any bird's nest other than swallows' nests, or removes any eggs or young birds from any nest, is guilty of a misdemeanor.

Killing,
etc., birds
in
cemeteries.

NOTE.—This section is founded on a statute in relation to cemeteries in Nevada County.—Stats. 1868, p. 26. There is no reason why the same act committed in another county should not be visited with the like punishment.

Killing
seals and
sea lions
within one
mile of
Cliff House.

599. Every person who willfully kills or destroys any seal or sea lion within one mile of the Cliff House, in the City and County of San Francisco, is guilty of a misdemeanor.

NOTE.—Stats. 1863, p. 330, Sec. 1.

Burning
buildings
and other
property
not the
subject
of arson.

600. Every person who willfully and maliciously burns any bridge exceeding in value fifty dollars, or any building, snowshed, or vessel, not the subject of arson, or any stack of grain of any kind, or of hay, or any growing or standing grain, grass, or tree, or any fence, not the property of such person, is punishable by imprisonment in the State Prison for not less than one nor more than ten years.

NOTE.—Stats. 1861, p. 131, Sec. 5. This section was amended so as to read as published in the text, by Act of April 1st, 1872, cited in lieu of Sec. 433, ante. The Act of April 1st, 1872, p. 895 (Stats. 1871-2), is amendatory of an Act repealed by this Code. It is believed that all which this amendatory Act would have accomplished is provided for in this Code.

Using
gunpowder,
etc., in
destroying
or injuring
any
building.

601. Every person who maliciously, by the explosion of gunpowder or other explosive substance, destroys, throws down, or injures the whole or any part of any building, by means of which the life or safety of a human being is endangered, is guilty of felony.

Malicious
injuries to
freehold.

602. Every person who willfully commits any trespass, by either:

1. Cutting down, destroying, or injuring any kind of wood or timber standing or growing upon the lands of another; or,

2. Carrying away any kind of wood or timber lying on such lands; or,

3. Maliciously injuring or severing from the freehold of another anything attached thereto, or the produce thereof; or,

4. Digging, taking, or carrying away from any lot situated within the limits of any incorporated city, without the license of the owner or legal occupant thereof, any earth, soil, or stone; or,

5. Digging, taking, or carrying away from any land

Amended

in any of the cities of the State, laid down on the map or plan of such city, or otherwise recognized or established as a street, alley, avenue, or park, without the license of the proper authorities, any earth, soil, or stone; or,

6. Putting up, affixing, fastening, printing, or painting upon any property belonging to the State, or to any city, county, town or village, or dedicated to the public, or upon any property of any person, without license from the owner, any notice, advertisement, or designation of, or any name for, any commodity, whether for sale or otherwise, or any picture, sign, or device, intended to call attention thereto;

—Is guilty of a misdemeanor.

~~license from the owner, any notice, advertisement, or designation of, or any name for, any commodity, whether for sale or otherwise, or any picture, sign, or device intended to call attention thereto;~~

—Is guilty of a misdemeanor.

NOTE.—This and the succeeding section embody in substance the penal provisions of Sec. 138 of the Crimes and Punishment Act; of an Act for the protection of timber, Stats. 1862, p. 307; of an Act for the punishment of persons cutting timber on certain lands of the State, Stats. 1863, p. 739; of an Act to prevent the destruction of timber on the lands of the State, Stats. 1864, p. 136; of an Act supplemental to the last, Stats. 1864, p. 361; of an Act relating to the Yosemite Valley and Mariposa Big Tree Grove, Stats. 1866, p. 710.

Subd. 6.—This provision is rendered necessary by the practice, unfortunately common, of affixing to any picturesque rock or point of land some advertisement of a current nostrum, etc. This was a simple trespass, but it is made a misdemeanor. It is taken from Sec. 707, New York Penal Code.

Stats. 1871-2, p. 384.

An Act to prevent persons passing through inclosures and leaving them open, and tearing down fences to make passage through inclosures.

[Approved March 16, 1872.]

[Enacting clause.]

SECTION 1. Any person passing through an inclosure of another and leaving the same open, is guilty of

a misdemeanor, and punishable by a fine not less than twenty dollars nor more than fifty dollars.

SEC. 2. Any person willfully or maliciously tearing down fences to make a passage through an inclosure, is guilty of a misdemeanor, and punishable by a fine not less than fifty dollars nor more than five hundred dollars.

SEC. 3. All fines collected under the provisions of this Act shall be paid into the County School Fund of the county where the offense is committed.

SEC. 4. This Act shall take effect immediately.

Limitation
upon the
operations
of the
preceding
section.

603. The following acts do not constitute a public offense, within the meaning of the preceding section:

1. Gathering pitch from trees on the public lands of the State or United States, unless the bark from such trees is removed for more than one eighth of their circumference, or cut made more than three inches in depth into the wood thereof;

2. Cutting trees upon the public lands of the State or United States, in good faith, for the purpose of manufacturing the same into lumber or firewood, or preparing such lands for agricultural or mining purposes;

—Unless such acts are committed upon swamp and overflowed, tide, salt marsh, or school lands belonging to the State, or within the limits of the lands granted by the United States to this State by Act of Congress of June thirteenth, eighteen hundred and sixty-four, relating to the Yosemite Valley and Mariposa Big Tree Grove.

NOTE.—See note to preceding section.

Injuries to
standing
crops, etc.

604. Every person who maliciously injures or destroys any standing crops, grain, cultivated fruits or vegetables, the property of another, in any case for which a punishment is not otherwise prescribed by this Code, is guilty of a misdemeanor.

Removing,
defacing, or
altering
landmarks

605. Every person who either:

1. Maliciously removes any monument erected for the purpose of designating any point in the boundary

of any lot or tract of land, or a place where a subaqueous telegraph cable lies; or, Same.

2. Maliciously defaces or alters the marks upon any such monument; or,

3. Maliciously cuts down or removes any tree upon which any such marks have been made for such purpose, with intent to destroy such marks;

—Is guilty of a misdemeanor.

NOTE.—Stats. 1857, p. 171, Sec. 2.

606. (§ 141.) Every person who willfully and intentionally breaks down, pulls down, or otherwise destroys or injures any public jail or other place of confinement, is punishable by fine not exceeding ten thousand dollars, and by imprisonment in the State Prison not exceeding five years. Destroying
or injuring
jails.

607. (§ 140.) Every person who willfully and maliciously cuts, breaks, injures, or destroys any bridge, dam, canal, flume, aqueduct, levee, embankment, reservoir, or other structure erected to create hydraulic power, or to drain or reclaim any swamp and overflowed, tide, or marsh land, or to conduct water for mining, manufacturing, reclamation, or agricultural purposes, or any embankment necessary to the same, or either of them; or willfully or maliciously makes, or causes to be made, any aperture in such dam, canal, flume, aqueduct, reservoir, embankment, levee, or structure, with intent to injure or destroy the same; or draws up, cuts, or injures any piles fixed in the ground, and used for securing any sea bank or sea walls, or any dock, quay, or jetty, lock, or sea wall, is punishable by a fine not exceeding one thousand dollars, or by imprisonment in the State Prison not exceeding two years, or by both. Destroying
or injuring
bridges,
dams,
levees,
water
dams, etc.

NOTE.—Stats. 1863, p. 58, Sec. 1; Stats. 24 and 25 Vict., Chap. 97, Sec. 31.

Burning or
injuring
rafts.

608. (§ 141.) Every person who willfully and maliciously burns, injures, or destroys any pile or raft of wood, plank, boards, or other lumber, or any part thereof, or cuts loose or sets adrift any such raft or part thereof, or cuts, breaks, injures, sinks, or sets adrift any vessel, the property of another, is punishable by fine not exceeding five hundred dollars, or by imprisonment in the County Jail not exceeding six months.

Setting
adrift
vessels.

Removing
buoys and
beacons.

609. Every person who willfully removes any buoy or beacon, placed in any waters within this State by lawful authority, is guilty of a misdemeanor.

Masking or
removing
signal
lights, or
exhibiting
false lights.

610. Every person who unlawfully masks, alters, or removes any light or signal, or willfully exhibits any light or signal, with intent to bring any vessel into danger, is punishable by imprisonment in the State Prison not less than three nor more than ten years.

NOTE.—Stats. 24 and 25 Vict., Chap. 97, Sec. 47.

Obstructing
navigable
streams.

611. Every person who unlawfully obstructs the navigation of any navigable stream, is guilty of a misdemeanor.

NOTE.—Stats. 1850, p. 188, Sec. 1.

Depositing
sand, dust,
etc., in
Humboldt
Bay.

612. Every person who throws, deposits, or permits another in his employ to throw or deposit, any sawdust, slabs, or refuse lumber, in any place where it may be carried or fall into the waters of Humboldt Bay, without first having constructed piers, bulkheads, dams, or other contrivances, approved by the Board of Supervisors of Humboldt County, to prevent the same from escaping into the channels of such bay, is guilty of a misdemeanor.

NOTE.—Stats. 1857, p. 66, Secs. 1, 2.

Throwing
overboard
ballast, or
otherwise
obstructing
the
navigation
of any
harbor, etc.

613. Every person who, within the anchorage of any port, harbor, or cove of this State, into which vessels may enter for the purpose of receiving or dis-

charging cargo, throws overboard from any vessel the ballast, or any part thereof, or who otherwise places or causes to be placed in such port, harbor, or cove, any obstructions to the navigation thereof, is guilty of a misdemeanor.

NOTE.—Stats. 1861, p. 224, Sec. 3; 1864, p. 138.

614. Every person mooring any vessel to or hanging on with a vessel to any buoy or beacon, placed by competent authority in any navigable waters of this State, is guilty of a misdemeanor.

Mooring
vessels to
buoys.

NOTE.—Stats. 1861, p. 224, Sec. 2.

615. Every person who willfully injures, defaces, or removes any signal, monument, building, or appurtenance thereto, placed, erected, or used by persons engaged in the United States Coast Survey, is guilty of a misdemeanor.

Injuries to
signals,
monu-
ments, etc.,
erected in
United
States
Coast
Survey.

NOTE.—Stats. 1852, p. 148, Sec. 6.

616. Every person who intentionally defaces, obliterates, tears down, or destroys any copy or transcript, or extract from or of any law of the United States or of this State, or any proclamation, advertisement, or notification set up at any place in this State, by authority of any law of the United States or of this State, or by order of any Court, before the expiration of the time for which the same was to remain set up, is punishable by fine not less than twenty nor more than one hundred dollars, or by imprisonment in the County Jail not more than one month.

Destroying
or tearing
down
notices,
etc., before
expiration
of time for
which they
were to
remain set
up.

NOTE.—Rep. Cod. Laws of Cal., 1868, Crimes and Punishment Act, Sec. 161.

617. Every person who maliciously mutilates, tears, defaces, obliterates, or destroys any written instrument, the property of another, the false making of which would be forgery, is punishable by imprisonment in the State Prison for not less than one nor more than five years.

Injuring or
destroying
written
instrument

NOTE.—Founded upon Sec. 68 of the Crimes and Punishment Act; Stats. 1850, p. 229; Nixon's Dig. Laws N. J., p. 188, Sec. 69. For "instruments" such as described in the text, see Sec. 470, ante, and elsewhere in this Code.

Opening or
publishing
sealed
letters.

618. (§ 111.) Every person who willfully opens or reads, or causes to be read, any sealed letter not addressed to himself, without being authorized so to do, either by the writer of such letter or by the person to whom it is addressed, and every person who, without the like authority, publishes any of the contents of such letter, knowing the same to have been unlawfully opened, is guilty of a misdemeanor.

Disclosing
contents of
tele-
graphic
message.

619. Every person who willfully discloses the contents of a telegraphic message, or any part thereof, addressed to another person, without the permission of such person, is punishable by imprisonment in the State Prison not exceeding five years, or in the County Jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both fine and imprisonment.

Altering
tele-
graphic
messages.

620. Every person who willfully alters the purport, effect, or meaning of a telegraphic message, to the injury of another, is punishable as provided in the preceding section.

NOTE.—Stats. 1862, p. 288, Sec. 1.

Opening
sealed
envelops
containing
tele-
graphic
dispatches.

621. Every person not connected with any telegraph office who, without the authority or consent of the person to whom the same may be directed, willfully opens any sealed envelop inclosing a telegraphic message and addressed to any other person, with the purpose of learning the contents of such message, or who fraudulently represents any other person and thereby procures to be delivered to himself any telegraphic message addressed to such other person, with the intent to use, destroy, or detain the same from the

person or persons entitled to receive such message, is punishable as provided in Section 619.

622. Every person, not the owner thereof, who willfully injures, disfigures, or destroys any monument, work of art, or useful or ornamental improvement within the limits of any village, town, or city, or any shade tree or ornamental plant growing therein, whether situated upon private ground or on any street, sidewalk, or public park or place, is guilty of a misdemeanor.

Injuring
works of
art or
improve-
ments in
any city,
town, or
village.

623. Every person who maliciously cuts, tears, defaces, breaks, or injures any book, map, chart, picture, engraving, statue, coin, model, apparatus, or other work of literature, art, or mechanics, or object of curiosity deposited in any public library, gallery, museum, collection, fair, or exhibition, is guilty of felony.

Destroying
works of
literature,
etc., in
public
libraries.

624. Every person who willfully breaks, digs up, obstructs, or injures any pipe or main for conducting gas or water, or any works erected for supplying buildings with gas or water, or any appurtenances or appendages therewith connected, is guilty of a misdemeanor.

Breaking
or obstruct-
ing gas or
water
pipes, etc.

NOTE.—Stats. 1861, p. 533, Secs. 1, 2.

625. Every person who, with intent to defraud or injure, opens or causes to be opened, or draws water from any stopcock or faucet by which the flow of water is controlled; after having been notified that the same has been closed or shut for specific cause, by order of competent authority, is guilty of a misdemeanor.

Drawing
water from
works after
they have
been
closed.

NOTE.—Stats. 1861, p. 533, Sec. 3. Many of the preceding sections are similar in language or import and intent with the New York Penal Code on the same subject, pp. 258–266.

TITLE XV.

MISCELLANEOUS CRIMES.

CHAPTER I. *Violation of the laws for the preservation of game and fish.*

II. *Of other and miscellaneous offenses.*

CHAPTER I.

VIOLATION OF THE LAWS FOR THE PRESERVATION OF GAME AND FISH.

SECTION 626. Destruction of grouse, duck, etc., when prohibited.

627. Same.

628. Destruction of elk, etc., when prohibited.

629. Having game in possession during the time that killing thereof is prohibited.

630. Use of phosphorus on land in certain counties prohibited,

631. Taking trout, when prohibited.

632. Same.

633. Taking trout by nets, etc., prohibited.

634. Taking salmon, when prohibited.

635. Use of poisonous or explosive substances in fishing prohibited.

636. California Indians exempted from certain penalties.

637. Fishways and ladders, penalties for not keeping.

Destruction of
grouse,
duck, etc.,
when
prohibited.

626. Every person who, in the Counties of San Bernardino or Los Angeles, between the first day of August of any year and the first day of April of the next year, or who in any other of the counties of this State, except the Counties of Lassen, Plumas, and Sierra, between the fifteenth day of March and the fifteenth day of September in each year, takes, kills, or destroys quail, partridges, or grouse, mallard, wood, teal, spoonbill, or any kind of broadbill ducks, is guilty of a misdemeanor.

Amended

NOTE.—Stats. 1870, p. 853, Sec. 1.

Stats. 1871-2, pp. 102, 103.

*An Act to prevent the capture and destruction of
mocking birds in this State.*

[Approved February 14, 1872.]

[Enacting clause.]

SECTION 1. Any person or persons who shall willfully and knowingly shoot, wound, trap, snare, or in any other manner catch or capture any mocking bird in the State of California, or shall knowingly take, injure, or destroy the nest of any mocking bird, or shall take, injure, or destroy any mocking bird's eggs, in the nest or otherwise, in said State, shall be deemed guilty of a misdemeanor, and upon conviction thereof before any Justice of the Peace of the township in which the offense shall have been committed, shall be fined in a sum not less than five dollars nor exceeding ten dollars, and cost of the action for each offense, or may be imprisoned not less than five days nor more than ten days, or by both such fine and imprisonment, as the judgment of the Court may direct.

SEC. 2. All fines collected under the provisions of this Act shall be paid into the County Treasury for the benefit of the Common School Fund.

SEC. 3. This Act shall take effect and be in force from and after its passage.

627. Every person who, in the Counties of Lassen, Same. Plumas, or Sierra, between the fifteenth day of March and the fifteenth day of September in each year, takes, kills, or destroys quail, partridges, or grouse, or who, in either of such counties, between the fifteenth day of March and the fifteenth day of August in each year, takes, kills, or destroys mallard, wood, teal, spoonbill, or any kind of broadbill ducks, is guilty of a misdemeanor.

NOTE.—Stats. 1870, p. 853, Sec. 1.

628. Every person who, between the first day of January and the first day of July in each year, takes, kills, or destroys any elk, deer, or antelope, is guilty of a misdemeanor.

Destruction of elk, etc., when prohibited.

NOTE.—Stats. 1854, p. 55, Sec. 2. The Act of March 20, 1872 (p. 433, Stats. 1872), is void, being amendatory

of an Act repealed by the operation of this Code; the only proposed changes thereby intended were to extend the time specified in the text from July 1st to August 1st, generally; and in certain counties, from February 1st to August 1st.

Having game in possession during the time that killing thereof is prohibited.

629. Every person who buys, sells, or has in his possession any of the game enumerated in the two preceding sections, within the time the taking or killing thereof is prohibited, except such as are tamed or kept for show or curiosity, is guilty of a misdemeanor.

NOTE.—Stats. 1854, p. 55, Sec. 3.

Use of phosphorus on land in certain counties prohibited.

630. Every person who, in the Counties of Santa Clara, Contra Costa, San Joaquin, Santa Cruz, or San Mateo, uses or distributes phosphorus upon any land or ground, between the first day of March and the first day of November in any year, is guilty of a misdemeanor.

NOTE.—Stats. 1863, p. 185, Secs. 1, 3.

Taking trout, when prohibited.

631. Every person who, between the fifteenth day of October in each year and the first day of April in the following year, takes or catches any trout, is guilty of a misdemeanor.

NOTE.—Stats. 1862, p. 94; 1868, p. 470; 1870, p. 663; see Stats. 1871-2, p. 385—Act for the preservation of fish in the waters of Siskiyou County—it being local, is not inserted.

Same.

632. Every person who, in the counties of Santa Clara, Santa Cruz, San Mateo, Monterey, Alameda, Marin, Placer, Nevada, Plumas, or Sierra, at any time takes or catches any trout, except with hook or line, is guilty of a misdemeanor. [Approved March 18, 1874.]

NOTE.—Stats. 1870, p. 664.

Taking trout by nets, etc., prohibited.

633. Every person who takes, catches, or kills any trout by the use of nets, weirs, baskets, or traps, is guilty of a misdemeanor.

NOTE.—Stats. 1870, p. 664.

Amended

4. Every person who, between the first day of August and the first day of November, in each year, catches any salmon, is guilty of a misdemeanor; possession of any salmon during said period, shall be prima facie evidence of a violation of this section. Every person catching, or having in possession, or offering for sale, within three years from the passage of this Act, shall be guilty of a misdemeanor. [Approved March 30, 1874. Effect immediately.]

for the purpose of a misdemeanor.

Taking salmon, when prohibited.

Use of poisonous or explosive substances in fishing prohibited.

NOTE.—Stats. 1870, p. 664.

636. California Indians, taking fish for their own subsistence, are exempted from the penalties prescribed in Sections 631, 632, 633, and 634.

California Indians exempted from certain penalties.

NOTE.—Stats. 1870, p. 665, Sec. 9.

637. Every owner of a dam or other obstruction in the waters of this State, who, after being requested by the Fish Commissioners so to do, fails to construct and keep in repair sufficient fishways or ladders on such dam or obstruction, is guilty of a misdemeanor.

Fishways and ladders, penalties for not-keeping.

NOTE.—Stats. 1870, p. 664, Sec. 3. The game laws of this State, and, indeed, the game laws of all the States, are entirely unlike the English game laws, which had their foundation in the idea, odious to republicans, of restricting the right of taking game to certain privileged classes, generally landholders. Under the English statute of 1831, the law was so modified as to enable any one to obtain a certificate or license to kill game on the payment of a fee. The sole object of our game laws is the protection of animals and birds from unreasonable and indiscriminate havoc, leaving all persons free to take or kill game, under certain restrictions as to the means of capture, and seasons of the year consistent with propagation. Sec. 4046, Subd. 23, of the Political Code, authorizes the Board of Supervisors to establish and enforce game laws for their respective counties; which removes from the Legislature this class of legislation and places it where it properly belongs, and where it may be successfully exercised.

CHAPTER II.

OF OTHER AND MISCELLANEOUS OFFENSES.

SECTION 638. Neglect or postponement out of regular order of telegraphic messages. Limitations.

639. Agent, operator, or employé using information from messages.

640. Clandestinely learning the contents of a telegraphic message.

641. Bribing telegraphic operator.

642. Collecting tolls, etc., at San Francisco, without authority of Harbor Commissioners.

643. Violations of the provisions of the Chapter relating to police regulations of San Francisco harbor.

644. Enticing seamen to desert.

645. Harboring deserting seamen.

646. Aiding apprentices to run away or harboring them.

647. Vagrants.

648. Issuing or circulating paper money.

649. Officers of fire department issuing false certificates of exemption.

650. Sending letters threatening to expose another.

651. Requiring wards or apprentices to work more than eight hours.

652. Officer or member of National Guard failing to attend parade, obey orders, or discharge duty.

653. Member of National Guard failing to attend parade, etc., when notified.

Neglect or postponement out of regular order of telegraphic messages.

Limitations.

638. Every agent, operator, or employé of any telegraph office, who willfully refuses or neglects to send any message received at such office for transmission, or willfully postpones the same out of its order, or willfully refuses or neglects to deliver any message received by telegraph, is guilty of a misdemeanor. Nothing herein contained shall be construed to require any message to be received, transmitted, or delivered, unless the charges thereon have been paid or tendered, nor to require the sending, receiving, or delivery of any message counseling, aiding, abetting, or encouraging treason against the Government of the United States or of this State, or other resistance to the lawful authority, or any message calculated to further any

fraudulent plan or purpose, or to instigate or encourage the perpetration of any unlawful act, or to facilitate the escape of any criminal or person accused of crime.

NOTE.—Stats. 1862, p. 289, Sec. 4; see Civil Code Cal., Secs. 2161, 2162, "Carriage of messages;" see, also, "Common carriers of messages," "Order of transmission by telegraph," *id.*, Sec. 2207.

639. Every agent, operator, or employé of any telegraph office who in any way uses or appropriates any information derived by him from any private message passing through his hands, and addressed to any other person, or in any other manner acquired by him by reason of his trust as such agent, operator, or employé, or trades or speculates upon any such information so obtained, or in any manner turns, or attempts to turn, the same to his own account, profit, or advantage, is punishable by imprisonment in the State Prison not exceeding five years, or by imprisonment in the County Jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both such fine and imprisonment.

Agent,
operator,
or employé
using
informa-
tion from
messages.

NOTE.—Stats. 1862, p. 289, Sec. 3, modified.

640. Every person who, by means of any machine, instrument, or contrivance, or in any other manner, willfully and fraudulently reads, or attempts to read, any message, or to learn the contents thereof, whilst the same is being sent over any telegraph line, or willfully and fraudulently, or clandestinely, learns or attempts to learn the contents or meaning of any message, while the same is in any telegraph office, or is being received thereat or sent therefrom, or who uses or attempts to use, or communicates to others, any information so obtained, is punishable as provided in Section 639.

Clandes-
tinely
learning
the con-
tents of a
tele-
graphic
message.

NOTE.—Stats. 1862, p. 289, Sec. 6, modified.

641. Every person who, by the payment or promise of any bribe, inducement, or reward, procures or

Bribing
tele-
graphic
operator.

attempts to procure any telegraph agent, operator, or employé to disclose any private message or the contents, purport, substance, or meaning thereof, or offers to any such agent, operator, or employé any bribe, compensation, or reward for the disclosure of any private information received by him by reason of his trust as such agent, operator, or employé, or uses or attempts to use any such information so obtained, is punishable as provided in Section 639.

NOTE.—Stats. 1862, p. 290, Sec. 7, modified. The grade of punishment provided in the three preceding sections has been increased from that of a misdemeanor to that of a felony.

Collecting
tolls, etc.,
at San
Francisco,
without
authority
of Harbor
Commissioners.

642. Every person who collects any toll, wharfage, or dockage, or lands, ships, or removes any property upon or from any portion of the water front of San Francisco, or from or upon any of the wharves, piers, or landings under the control of the Board of State Harbor Commissioners, without being by such Board authorized so to do, is guilty of a misdemeanor.

NOTE.—Stats. 1864, p. 145, Sec. 11. See State Harbor Commissioners, Vol. I, Pol. Code, Sec. 2527, to provide for collecting revenue from wharves, etc.; also, id., Sec. 2524, Subd. 6, to collect tolls; id., Sec. 2539, to fix tolls; maximum, Sec. 2540, id. From an examination of these provisions of the Political Code it will be seen that those only are authorized to collect tolls, etc., who are authorized thereto by appointment or lease from the Harbor Commissioners.

Violations
of the
provisions
of the
Chapter
relating to
police
regulations
of San
Francisco
harbor.

643. Every person who violates any of the provisions of the laws of this State relating to sailor boarding houses and shipping offices in San Francisco, or who receives any gratuity or reward other than as therein provided, for the performance of any services under a license issued pursuant to the provisions of such laws, is guilty of a misdemeanor.

NOTE.—Stats. 1870, p. 244. See Political Code, Vol. I, pp. 485-492, Secs. 2583-2607, "Sailors and sailor boarding houses."

644. Every person who entices seamen to desert from any vessel lying in the waters of this State, and on board of which they have shipped for a term or voyage unexpired at the time of such enticement, is guilty of a misdemeanor.

Enticing
seamen
to desert.

NOTE.—Stats. 1853, p. 186, Sec. 1. See Pol. Code, Sec. 2602, "Deserters, who are, and how treated."

645. Every person who harbors or secretes any seaman, knowing him to be shipped, and with a view to persuade or enable him to desert, is guilty of a misdemeanor.

Harboring
deserting
seamen.

NOTE.—Stats. 1853, p. 186, Sec. 2. Who are deserters, etc., see Sec. 2602, Pol. Code. The three preceding sections are required to be published by the "Marine Board," under Sec. 2607, Pol. Code, together with Art. XI, Chap. I, Title VI, "Public ways," Part III of the Political Code.

646. Every person who willfully and knowingly aids, assists, or encourages to run away, or who harbors or conceals any person bound or held to service or labor, is guilty of a misdemeanor.

Aiding
apprentices
to run
away or
harboring
them.

NOTE.—Stats. 1858, p. 137, Sec. 17. See "Apprentices," "Master and servant," Civil Code, Sec. 264.

647. Every person (except a California Indian) without visible means of living, who has the physical ability to work, and who does not for the space of ten days seek employment, nor labor when employment is offered him; every healthy beggar who solicits alms as a business; every person who roams about from place to place without any lawful business; every idle or dissolute person, or associate of known thieves, who wanders about the streets at late or unusual hours of the night, or who lodges in any barn, shed, shop, outhouse, vessel, or place other than such as is kept for lodging purposes, without the permission of the owner or party entitled to the possession thereof; every lewd and dissolute person, who lives in and about houses of ill-fame, and every common prostitute and common

Vagrants.

drunkard, is a vagrant, and punishable by imprisonment in the County Jail not exceeding ninety days.

NOTE.—Stats. 1863, p. 770, Sec. 1. The Stat. 5 Geo. IV, Chap. 83, for the punishment of idle and disorderly persons (2 Chitty Stats., p. 145), gave to statutes similar to the text the title of *Vagrant Acts*. A vagrant is a person who lives idly, without any settled home; a person who refuses to labor or work, or who goes about begging. Such is the definition of Bouvier, supported by Wile., p. 331; 5 East., p. 339; 8 Term., p. 26. It will be observed, however, that the Code specifies the acts constituting the offense of vagrancy, and does not leave it to the lexicographers or other authorities to determine them.

Issuing or circulating paper money.

648. Every person who makes, issues, or puts in circulation any bill, check, ticket, certificate, promissory note, or the paper of any bank, to circulate as money, except as authorized by the laws of the United States, for the first offense, is guilty of a misdemeanor, and for each and every subsequent offense, is guilty of felony.

NOTE.—Stats. 1855, p. 128, Secs. 1, 2. See Sec. 356, and note, Civil Code Cal., expressly prohibiting banks of circulation.—State Const., Art. IV, Sec. 35.

Officers of fire department issuing false certificates of exemption.

649. Every officer of a fire department who willfully issues or causes to be issued any certificate of exemption to a person not entitled thereto, is guilty of a misdemeanor.

NOTE.—Stats. 1864, p. 257, Sec. 7.

Sending letters threatening to expose another.

650. Every person who knowingly and willfully sends or delivers to another any letter or writing, whether subscribed or not, threatening to accuse him or another of a crime, or to expose or publish any of his failings or infirmities, is guilty of a misdemeanor.

NOTE.—This is founded upon part of Section 110 of the Crimes and Punishment Act.—Stats. 1850, p. 229. The portion of that section relating to sending threatening letters is incorporated in Section 523, ante, Chapter VII, relating to extortion.

651. Every person having a minor child under his control, either as a ward or an apprentice, who, except in vinicultural or horticultural pursuits, or in domestic or household occupations, requires such child to labor more than eight hours in any one day, is guilty of a misdemeanor.

Requiring
wards or
apprentices
to work
more than
eight
hours.

NOTE.—Stats. 1868, p. 63.

Stats. 1871-2, p. 951.

An Act to protect the wages of labor and the salaries and fees of subordinate officers.

[Approved April 1, 1872.]

[Enacting clause.]

SECTION 1. Every person who employs laborers upon the public works, and who takes, keeps, or receives any part or portion of the wages due to such laborers from the State or municipal corporation for which such work is done, is guilty of a felony.

SEC. 2. Every officer of the State, or any county, city, or township therein, who keeps or retains any part or portion of the salary or fees allowed by law to his deputy, clerk, or subordinate officer, is guilty of a felony.

SEC. 3. This Act shall be in force from and after its passage.

652. Every commissioned officer of the National Guard who willfully fails to attend any parade or encampment, and every member of the National Guard who neglects or refuses to obey the lawful command of his superior on any day of parade or encampment, or to perform such military duty as may be lawfully required of him, is punishable by a fine of not less than five nor more than one hundred dollars.

Officer or
member of
National
Guard
failing to
attend
parade,
obey
orders, or
discharge
duty.

NOTE.—See Political Code Cal., Secs. 1930, 2026, "Militia;" Secs. 2018-2030, "Parades and drills."

653. Every member of the National Guard who, when duly notified, fails to appear at a parade, or who disobeys any lawful order, or who uses disrespectful language towards his superior, or who commits any act of insubordination, is guilty of a misdemeanor.

Member of
National
Guard
failing to
attend
parade,
etc., when
notified.

654. Every parent, guardian, or teacher who upbraids, insults, or abuses a child in the presence or hearing of a school, is guilty of a misdemeanor.

ence.

o preceding section. The section is placed thus, (§ 1), (§ 65), and so the preceding sections, indicate the Penal Act of April 16, 1850, "Con-punishments." They were used in re retained for convenience in refer-

TITLE XVI.

GENERAL PROVISIONS.

SECTION 654. Acts made punishable by different provisions of this Code.

- 655. Acts punishable under foreign law.
- 656. Foreign conviction or acquittal.
- 657. Contempts, how punishable.
- 658. Mitigation of punishment in certain cases.
- 659. Aiding in misdemeanor.
- 660. Sending letters, when deemed complete.
- 661. Removal from office for violation or neglect of official duty by public officers.
- 662. Omission to perform duty, when punishable.
- 663. Attempts to commit crimes, when punishable.
- 664. Attempts to commit crimes, how punishable.
- 665. Restrictions upon the preceding sections.
- 666. Second offense, how punished after conviction of former offense.
- 667. Second offenses, how punished after conviction of attempt to commit a State Prison offense.
- 668. Foreign conviction for former offense.
- 669. Second term of imprisonment, when to commence.
- 670. When term of imprisonment commences, etc.
- 671. Imprisonment for life.
- 672. Fine may be added to imprisonment.
- 673. Civil rights of convict suspended.
- 674. Civil death.
- 675. Limitations on two preceding sections.
- 676. Person of convict protected.
- 677. Forfeitures.

Acts made punishable by different provisions of this Code.

654. An act or omission which is made punishable in different ways by different provisions of this Code may be punished under either of such provisions, but in no case can it be punished under more than one;

an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other. In the cases specified in Sections 648, 667, and 668, the punishments therein prescribed must be substituted for those prescribed for a first offense, if the previous conviction is charged in the indictment and found by the jury.

655. An act or omission declared punishable by this Code is not less so because it is also punishable under the laws of another State, Government, or country, unless the contrary is expressly declared.

Acts
punishable
under
foreign
law.

656. Whenever on the trial of an accused person it appears that upon a criminal prosecution under the laws of another State, Government, or country, founded upon the act or omission in respect to which he is on trial, he has been acquitted or convicted, it is a sufficient defense.

Foreign
conviction
or acquitta

NOTE.—This section is intended to apply in cases where the foreign acquittal or conviction took place in respect to the particular *act or omission* charged against the accused upon the trial in this State, and is not restricted to cases where the accused was tried abroad under the same *charge*.

657. A criminal act is not the less punishable as a crime because it is also declared to be punishable as a contempt.

Contempts,
how
punishable

658. When it appears, at the time of passing sentence upon a person convicted upon indictment, that such person has already paid a fine or suffered an imprisonment for the act of which he stands convicted, under an order adjudging it a contempt, the Court authorized to pass sentence may mitigate the punishment to be imposed, in its discretion.

Mitigation
of punish-
ment in
certain
cases.

659. Whenever an act is declared a misdemeanor, and no punishment for counseling or aiding in the

Aiding in
misdemeanor.

commission of such act is expressly prescribed by law, every person who counsels or aids another in the commission of such act is guilty of a misdemeanor.

NOTE.—See “Accessories,” Secs. 32, 33, ante.

Sending
letters,
when
deemed
complete.

660. In the various cases in which the sending of a letter is made criminal by this Code, the offense is deemed complete from the time when such letter is deposited in any Post Office or any other place, or delivered to any person, with intent that it shall be forwarded.

NOTE.—Rex vs. Williams, 2 Campb., p. 506.

Removal
from office
for viola-
tion or
neglect of
official duty
by public
officers.

661. In addition to the penalty affixed by express terms, to every neglect or violation of official duty on the part of public officers, State, county, city, or township, where it is not so expressly provided, they may, in the discretion of the Court, be removed from office.

NOTE.—See Part III, Title I, Chap. VII, “Public officers,” Political Code Cal., Sec. 841, et seq.

Omission to
perform
duty, when
punishable

662. No person is punishable for an omission to perform an act, where such act has been performed by another person acting in his behalf and competent by law to perform it.

Attempts
to commit
crimes,
when
punishable

663. Any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was perpetrated by such person in pursuance of such attempt, unless the Court, in its discretion, discharges the jury and directs such person to be tried for such crime.

NOTE.—Stats. 14 and 15 Vict., Chap. 100, Sec. 9.

Attempts
to commit
crimes,
how
punishable

664. Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, as follows :

1. If the offense so attempted is punishable by im-

prisonment in the State Prison for five years, or more, Same.
or by imprisonment in a County Jail, the person guilty of such attempt is punishable by imprisonment in the State Prison, or in a County Jail, as the case may be, for a term not exceeding one half the longest term of imprisonment prescribed upon a conviction of the offense so attempted.

2. If the offense so attempted is punishable by imprisonment in the State Prison for any term less than five years, the person guilty of such attempt is punishable by imprisonment in the County Jail for not more than one year.

3. If the offense so attempted is punishable by a fine, the offender convicted of such attempt is punishable by a fine not exceeding one half the largest fine which may be imposed upon a conviction of the offense so attempted.

4. If the offense so attempted is punishable by imprisonment and by a fine, the offender convicted of such attempt may be punished by both imprisonment and fine, not exceeding one half the longest term of imprisonment and one half the largest fine which may be imposed upon a conviction for the offense so attempted.

NOTE.—As declared in the first part of this section, such attempts as those named in Secs. 216, 217, ante, and assaults with intent to commit a felony, named in Secs. 220–222, ante, having therefor a punishment provided, are not included in this section.

665. The last two sections do not protect a person who, in attempting unsuccessfully to commit a crime, accomplishes the commission of another and different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed. Restrictions upon the preceding sections.

666. Every person who, having been convicted of any offense punishable by imprisonment in the State

Second
offense,
how
punished
after
conviction
of former
offense.

Prison, commits any crime after such conviction, is punishable therefor, as follows:

1. If the offense of which such person is subsequently convicted is such that, upon a first conviction, an offender would be punishable by imprisonment in the State Prison for any term exceeding five years, such person is punishable by imprisonment in the State Prison not less than ten years.

2. If the subsequent offense is such that, upon a first conviction, the offender would be punishable by imprisonment in the State Prison for five years, or any less term, then the person convicted of such subsequent offense is punishable by imprisonment in the State Prison not exceeding ten years.

3. If the subsequent conviction is for petit larceny, or any attempt to commit an offense which, if committed, would be punishable by imprisonment in the State Prison not exceeding five years, then the person convicted of such subsequent offense is punishable by imprisonment in the State Prison not exceeding five years.

Second
offenses,
how pun-
ished after
conviction
of attempt
to commit
a State
Prison
offense.

667. Every person who, having been convicted of petit larceny, or of an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the State Prison, commits any crime after such conviction, is punishable as follows:

1. If the subsequent offense is such that, upon a first conviction, the offender would be punishable by imprisonment in the State Prison for life, at the discretion of the Court, such person is punishable by imprisonment in such prison during life.

2. If the subsequent offense is such that, upon a first conviction, the offender would be punishable by imprisonment in the State Prison for any term less than for life, such person is punishable by imprisonment in such prison for the longest term prescribed, upon a conviction for such first offense.

3. If the subsequent conviction is for petit larceny, or for an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the State Prison, then such person is punishable by imprisonment in such prison not exceeding five years.

NOTE.—The following letter from Hon. S. H. Dwinelle, Judge of the Fifteenth Judicial District, to the Code Commission, shows the necessity for the insertion of the words "petit larceny" in Secs. 666 and 667, as well as the great propriety of these provisions: "Our cities and towns are subjected to repeated raids from petit thieves, for which New York has a partial remedy; and, after consulting with the District Attorney and heads of the Police Department here, I have concluded to call * * * * the attention of the Code Commission to the New York statute, in considering 'crimes and punishments.' Popularly, the law is known in New York as 'petit larceny, second offense,' petit larceny being practically made a felony, punished by confinement in the State Prison. The New York provision will be found in the revised statutes of that State, Vol. 2, p. 883, Sec. 9, though I think we should have in this State a section devoted exclusively to the subject matter. In New York the practice is for the Grand Jury to find an indictment charging that the accused was charged with, arrested, brought before a Justice of the Peace (or Police Judge), tried, and convicted of petit larceny, and that, subsequent to such conviction, the accused had been guilty of another petit larceny, describing it, the Courts there having held the record of the first conviction was prima facie evidence of the fact. Certainly it is as great a crime, morally, to steal \$99 by two efforts as it is to steal \$50 at one. We have thieves here who are fully posted as to the law regarding petit and grand larceny, and have been convicted of the former numerous times. I think you will realize the importance of the proposed statute." The partial remedy referred to formed the basis of these sections.

667. Under the Penal Code, there is no distinction between the first conviction of petit larceny, had anterior to January 1st, 1873, and a conviction for the same offense had after that date. *Ex-parte Gutier.*
28

668. Every person who has been convicted in any other State, Government, or country, of an offense which, if committed within this State, would be punishable by the laws of this State by imprisonment in the State Prison, is punishable for any subsequent crime committed within this State in the manner pre-

Foreign conviction for former offense.

scribed in the last two sections, and to the same extent as if such first conviction had taken place in a Court of this State.

Second
term of
imprison-
ment,
when to
commence.

669. When any person is convicted of two or more crimes before sentence has been pronounced upon him for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or other subsequent term of imprisonment, as the case may be.

When
term of
imprison-
ment com-
mences, etc

670. The term of imprisonment fixed by the judgment in a criminal action commences to run only upon the actual delivery of the defendant at the place of imprisonment, and if thereafter, during such term, the defendant by any legal means is temporarily released from such imprisonment and subsequently returned thereto, the time during which he was at large must not be computed as part of such term.

NOTE.—The necessity and propriety of this section became apparent to the Supreme Court of our State, and was suggested by the Chief Justice.

Imprison-
ment for
life.

671. Whenever any person is declared punishable for a crime by imprisonment in the State Prison for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the Court authorized to pronounce judgment upon such conviction may, in its discretion, sentence such offender to imprisonment during his natural life, or for any number of years not less than that prescribed.

Fine may
be added to
imprison-
ment.

672. Upon a conviction for any crime punishable by imprisonment in any jail or prison, in relation to which no fine is herein prescribed, the Court may impose a fine on the offender not exceeding two hundred dollars, in addition to the imprisonment prescribed.

673. A sentence of imprisonment in a State Prison for any term less than for life suspends all the civil rights of the person so sentenced, and forfeits all public offices and all private trusts, authority, or power during such imprisonment. Civil rights of convict suspended.

674. A person sentenced to imprisonment in the State Prison for life is thereafter deemed civilly dead. Civil death

675. The provisions of the last two preceding sections must not be construed to render the persons therein mentioned incompetent as witnesses upon the trial of a criminal action or proceeding, or incapable of making and acknowledging a sale or conveyance of property. Limitations on two preceding sections.

676. The person of a convict sentenced to imprisonment in the State Prison is under the protection of the law, and any injury to his person, not authorized by law, is punishable in the same manner as if he was not convicted or sentenced. Person of convict protected.

677. No conviction of any person for crime works any forfeiture of any property, except in cases in which a forfeiture is expressly imposed by law; and all forfeitures to the people of this State, in the nature of a deodand, or where any person shall flee from justice, are abolished. Forfeitures

NOTE.—The very salutary and almost indispensable provisions contained in this Title were either wholly taken from, or suggested by, the Penal Code of N. Y., pp. 272-279, and seemed to be so obviously appropriate as a complement to a thorough administration of penal law, that their future use will give rise to the inquiry, how did our Courts succeed so well without them? The Act of April 16, 1850—Crimes and Punishments of this State—was taken almost literally from the N. Y. Code, hence their great similarity, notwithstanding very many changes have been made during a series of years in legislating in each of the States. It would be wise and beneficial if the penal laws of all the States were exact copies of each other, so that the decisions of the Courts of one might be available to the others.

678. Whenever in this Code the character or grade of an offense, or its punishment, is made to depend upon the value of the property, such value shall be estimated exclusively in United States gold coin.

PART II.

OF CRIMINAL PROCEDURE.

mon law convictions, as well as statutory; the latter is statutory only, and when authorized under the Constitution the statute providing for it must be strictly pursued. When the Code provides for sentence it must be preceded by a conviction.—1 Caines N. Y., p. 72; 34 Maine, p. 594; 16 Ark., p. 601. Sentence does not always follow conviction.—14 Pick., p. 88; 17 id., p. 296; 8 Wend., p. 204; 4 Ill., p. 76. In summary convictions jurisdictional and all other essential statutory proceedings must affirmatively appear.—1 Burr., p. 613; 19 Johns. N. Y., p. 39; 14 Mass., p. 224; 10 Metc., p. 222; 7 Barb., p. 462; 2 Yeates, Penn., p. 475; 3 Maine, p. 51; 4 Johns., p. 292. See Index, "Judgment," sections and notes there referred to.

Public
offenses,
how
prosecuted

682. (§ 7.) Every public offense must be prosecuted by indictment, except:

1. Where proceedings are had for the removal of civil officers of the State.
2. Offenses arising in the militia when in actual service, and in the land and naval forces in time of war, or which this State may keep, with the consent of Congress, in time of peace.
3. Offenses tried in Justices' and Police Courts.

NOTE.—See note to preceding section, and Art. I, Sec. 8, State Const., and references in note thereto; App. Pol. Code, vol. 2, p. 380.

Criminal
action
defined.

683. (§ 8.) The proceeding by which a party charged with a public offense is accused and brought to trial and punishment, is known as a criminal action.

Parties to
a criminal
action.

684. (§ 9.) A criminal action is prosecuted in the name of the people of the State of California, as a party, against the person charged with the offense.

The party
prosecuted
known as
defendant.

685. (§ 10.) The party prosecuted in a criminal action is designated in this Code as the defendant.

Rights of
defendant
in a
criminal
action.

686. (§ 11.) In a criminal action the defendant is entitled:

1. To a speedy and public trial.
2. To be allowed counsel as in civil actions, or to appear and defend in person and with counsel.

3. To produce witnesses on his behalf, and to be Same. confronted with the witnesses against him, in the presence of the Court, except that where the charge has been preliminarily examined before a committing magistrate and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness; or where the testimony of a witness on the part of the people, who is unable to give security for his appearance, has been taken conditionally in the like manner in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, the deposition of such witness may be read, upon its being satisfactorily shown to the Court that he is dead or insane, or cannot with due diligence be found within the State.

NOTE.—See notes to Sec. 681, ante, and 689, post.

687. (§ 12.) No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted. Second prosecution for the same offense prohibited.

† 688. (§ 13.) No person can be compelled, in a criminal action, to be a witness against himself; nor can a person charged with a public offense be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge. No person to be a witness against himself in a criminal action, or to be unnecessarily restrained.

NOTE.—He may testify in his own behalf.—See notes to Sec. 681, ante, and 689, post.

689. (§ 14.) No person can be convicted of a public offense unless by the verdict of a jury, accepted and recorded by the Court, or upon a plea of guilty, or upon judgment against him upon a demurrer to the indictment, in the case mentioned in Section 1011, or upon a judgment of a Police or Justice's Court, a jury having been waived. No person to be convicted but upon verdict or judgment.

† 688. To require the prisoner, during the progress of the trial, to appear and remain with chains and shackles upon his limbs, without evident necessity, as a means of securing his presence for judgment, is a violation of the Common Law rules, and of the statute. *People v. Harrington*, 42 Cal. 165.

NOTE.—If a defendant does not plead when he has an opportunity, judgment may be pronounced against him.—Sec. 1011, post; see *People vs. King*, 28 Cal., p. 265; *People vs. Joselyn*, 29 Cal., p. 562. Under this Chapter of “Preliminary Provisions,” it may be generally said that as a necessary concomitant to all statutes declaring acts or omissions to be criminal, a mode of procedure to inflict the penalty provided must exist. Heretofore if the statute did not provide a mode of procedure, the common law of England as it is familiarly known, but which from the fact that it was the common law of our mother country—has been so frequently adopted by statute, so universally recognized and acted upon by our Courts for supplying omissions and defects in statutory law—that it is by them recognized as one of our own naturalized and well established institutions, and may now be well called the *common law of the United States*, furnished a method of procedure which was usually pursued by them. Some of the more prominent features of this system are: 1. The presumption of innocence, and right to reasonable doubt of guilt. 2. Not to be held to answer except by inquest of a Grand Jury. 3. Trial by jury of his peers. 4. The determination of guilt or innocence without reference to general character. 5. Not to require prisoner to criminate himself nor to exculpate himself by giving his testimony. 6. Must not be tried twice for the same offense. 7. Nor be punished for an act done prior to the passage of the statute making it an offense, nor by a severer punishment than that there provided. It may be correctly remarked that the custom of some continental European systems of allowing general character, habits of life, previous history, and other surroundings to be subjects of inquiry by the Court in determining the probabilities of the guilt or innocence of one accused of crime, whilst it has not received favor in our Courts, or at least has no status as furnishing evidence for the defense, yet the permission given by the statutes of several States and this Code to the defendant to testify in his own defense, looks to the observant like a step in the direction of relaxing rules heretofore rigidly observed. The general principles of our system, here enumerated and contained in the preceding sections, are the subjects of constitutional guaranty and protection, and this Code consequently rigidly adheres to them, except that a defendant, if he desires to do so, may testify in his own behalf.—See Sec. 1323, post, and note.

TITLE I.

OF THE PREVENTION OF PUBLIC OFFENSES.

CHAPTER I. *Of lawful resistance.*II. *Of the intervention of the officers of justice.*III. *Security to keep the peace.*IV. *Police in cities and towns, and their attendance at exposed places.*V. *Suppression of riots.*

CHAPTER I.

OF LAWFUL RESISTANCE.

SECTION 692. Lawful resistance, by whom made.

693. By the party, in what cases and to what extent.

694. By other parties, in what cases.

692. (§ 15.) Lawful resistance to the commission of a public offense may be made:

Lawful
resistance,
by whom
made.

1. By the party about to be injured;
2. By other parties.

NOTE.—See “Personal Rights,” Civil Code Cal., vol. 1, pp. 23–26, Secs. 43–50, and notes; “What force may be used to protect whom,” *id.*, Sec. 50.

693. (§ 16.) Resistance sufficient to prevent the offense may be made by the party about to be injured:

By the
party, in
what cases
and to what
extent.

1. To prevent an offense against his person, or his family, or some member thereof.

2. To prevent an illegal attempt by force to take or injure property in his lawful possession.

NOTE.—See “Force in resistance,” Sec. 50, Civil Code.

694. (§ 17.) Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense.

By other
parties, in
what cases.

CHAPTER II.

OF THE INTERVENTION OF THE OFFICERS OF JUSTICE.

SECTION 697. Intervention of officers, in what cases.

698. Persons acting in their aid justified.

Interven-
tion of
officers, in
what cases.

697. (§ 18.) Public offenses may be prevented by the intervention of the officers of justice:

1. By requiring security to keep the peace;
2. By forming a police in cities and towns, and by requiring their attendance in exposed places;
3. By suppressing riots.

NOTE.—*Subd. 1*, see Sec. 706, post.*Subd. 2*, see Sec. 720, post.

Subd. 3—At common law, “the Sheriff, Under Sheriff, Constable, or any other peace officer, may and ought to do all that in them lies towards the suppressing of a riot, and may command all other persons to assist them.”—1 Russ. Crimes, pp. 285–6. So, also, may private persons, by endeavoring to stay the execution of riotous purposes.—1 Hawk. P. C., Chap. 65, Sec. 11; and may arm themselves for that purpose, and, if necessary, may use the arms. Who are peace officers, see Sec. 817, post. Who may arrest and when, Secs. 836–838, post.

Persons
acting in
their aid
justified.

698. (§ 19.) When the officers of justice are authorized to act in the prevention of public offenses, other persons, who, by their command, act in their aid, are justified in so doing.

NOTE.—Who are peace officers, see Sec. 817, post; see note to Sec. 697, ante.

CHAPTER III.

SECURITY TO KEEP THE PEACE.

SECTION 701. Information of threatened offense.

702. Examination of complainant and witnesses.

703. Warrant of arrest.

704. Proceedings on charges being controverted.

SECTION 705. Person complained of, when to be discharged.

706. Security to keep the peace, when required.

707. Effect of giving or refusing to give security.

708. Person committed for not giving security, how discharged.

709. Undertaking to be filed in Clerk's office.

710. Security, when required for assault committed in the presence of a Court or magistrate.

711. Undertaking, when broken.

712. Undertaking, when and how to be prosecuted.

713. Evidence of breach.

714. Security for the peace not required, except in accordance with this Chapter.

701. (§ 20.) An information may be laid before any of the magistrates mentioned in Section 808, that a person has threatened to commit an offense against the person or property of another.

Information of threatened offense.

NOTE.—Stats. 1863, p. 158. The section referred to is Section 103 of the Crimes and Punishment Act of 1851; the word "information" is used in place of the word "complaint," as more expressive. That a named person is menacing or threatening to do towards or against the person or property of another an act which the Penal Code forbids to be done, or is omitting to do that which it commands, must be the subject of the information provided for in the text. The threat of an intention to commit the offense must appear to be one which will be executed unless the person so threatening is further restrained than he seems to be by the fact that the act is in violation of the law.

702. (§ 21.) When the information is laid before such magistrate he must examine on oath the informer, and any witness he may produce, and must take their depositions in writing, and cause them to be subscribed by the parties making them.

Examination of complainant and witnesses.

NOTE.—This should be in concise language, stating all the jurisdictional facts, and should clearly specify the threatened offense, and when reduced to writing and sworn to constitutes the complaint or information upon which the warrant issues.

703. (§ 22.) If it appears from the depositions that there is just reason to fear the commission of the

Warrant of arrest.

offense threatened, by the person so informed against, the magistrate must issue a warrant, directed generally to the Sheriff of the county, or any Constable, Marshal, or Policeman in the State, reciting the substance of the information, and commanding the officer forthwith to arrest the person informed of and bring him before the magistrate.

Proceed-
ings on
charges
being con-
troverted.

704. (§ 23.) When the person informed against is brought before the magistrate, if the charge be controverted, the magistrate must take testimony in relation thereto. The evidence must be reduced to writing and subscribed by the witnesses.

Person
complained
of, when
to be
discharged.

705. (§ 24.) If it appears that there is no just reason to fear the commission of the offense alleged to have been threatened, the person complained of must be discharged.

Security
to keep
the peace,
when
required.

706. (§ 25.) If, however, there is just reason to fear the commission of the offense, the person complained of may be required to enter into an undertaking in such sum, not exceeding five thousand dollars, as the magistrate may direct, with one or more sufficient sureties, to keep the peace towards the people of this State, and particularly towards the informer. The undertaking is valid and binding for six months, and may, upon the renewal of the information, be extended for a longer period, or a new undertaking may be required.

Effect of
giving or
refusing
to give
security.

707. (§ 26.) If the undertaking required by the last section is given, the party informed of must be discharged. If he does not give it, the magistrate must commit him to prison, specifying in the warrant the requirement to give security, the amount thereof, and the omission to give the same.

Person
committed
for not
giving
security,
how
discharged.

708. (§ 27.) If the person complained of is committed for not giving the undertaking required, he

may be discharged by any magistrate, upon giving the same.

709. (§ 28.) The undertaking must be filed by the magistrate in the office of the Clerk of the county.

Undertaking to be filed in Clerk's office.

710. (§ 29.) A person who, in the presence of a Court or magistrate, assaults or threatens to assault another, or to commit an offense against his person or property, or who contends with another with angry words, may be ordered by the Court or magistrate to give security, as in this Chapter provided, and if he refuse to do so, may be committed as provided in Section 707.

Security, when required for assault committed in the presence of a Court or magistrate

711. Upon the conviction of the person informed against of a breach of the peace, the undertaking is broken.

Undertaking, when broken.

712. (§ 31.) Upon the District Attorney's producing evidence of such conviction to the County Court of the County, the Court ~~must order~~ the undertaking to be prosecuted, and the District Attorney must thereupon commence an action upon it in the name of the people of this State.

Undertaking, when and how to be prosecuted

713. (§ 32.) In the action the offense stated in the record of conviction must be alleged as a breach of the undertaking, and such record is conclusive evidence of the breach.

Evidence of breach.

714. (§ 33.) Security to keep the peace, or be of good behavior, cannot be required except as prescribed in this Chapter.

Security for the peace not required, except in accordance with this Chapter.

NOTE.—These proceedings are provided for securing a more perfect respect for the law than their mere existence carries to the person upon whom they are intended to operate. Every one is presumed to know the law, but in many instances, as a matter of fact, the existence of the law is unknown. By these proceed-

ings, therefore, an actual breach of the law may be prevented where an ignorant violation would be punished.

CHAPTER IV.

POLICE IN CITIES AND TOWNS, AND THEIR ATTENDANCE AT EXPOSED PLACES.

SECTION 719. Organization and regulation of the police.

720. Force to preserve the peace at public meetings, when and how ordered.

Organiza-
tion and
regulation
of the
police.

719. (§ 34.) The organization and regulation of the police, in the cities and towns of this State, is governed by special laws.

Force to
preserve
the peace
at public
meetings,
when
and how
ordered.

720. (§ 35.) The Mayor or other officer having the direction of the police of a city or town must order a force, sufficient to preserve the peace, to attend any public meeting, when he is satisfied that a breach of the peace is reasonably apprehended.

NOTE.—Personal knowledge, or a complaint, or information, as provided in Sec. 701, ante, or any other reliable facts coming to the officer, is sufficient, if it induce the belief that a breach of the peace is reasonably to be apprehended.

CHAPTER V.

SUPPRESSION OF RIOTS.

SECTION 723. Power of Sheriff or other officer in overcoming resistance to process.

724. The officer to certify to Court the name of the resisters, etc.

725. When Governor to order out a military force to aid in executing process.

726. Magistrates and officers to command rioters to disperse.

727. To arrest rioters if they do not disperse.

728. Officers who may order out the military.

- SECTION 729. Commanding officer and troops to obey the order.
 730. Armed force to obey orders of whom.
 731. Conduct of the troops.
 732. Governor may in certain cases declare a county in a state of insurrection.
 733. May revoke the proclamation.

723. (§ 36.) When a Sheriff or other public officer authorized to execute process finds, or has reason to apprehend that resistance will be made to the execution of the process, he may command as many male inhabitants of his county as he may think proper to assist him in overcoming the resistance, and, if necessary, in seizing, arresting, and confining the persons resisting, their aiders and abettors.

Power of Sheriff or other officer in overcoming resistance to process.

NOTE.—This section was amended so as to read as published in the text, by Act of April 1, 1872, cited in note in lieu of Sec. 433, ante. See, also, note to Subd. 3 of Sec. 697, ante; and Sec. 701, ante, and note, “Information;” and 720, ante, and note, as to “Sufficient apprehension.”

724. (§ 37.) The officer must certify to the Court from which the process issued the names of the persons resisting, and their aiders and abettors, to the end that they may be proceeded against for their contempt of Court.

The officer to certify to Court the name of the resisters, etc.

NOTE.—This is only to be done in case there has been *actual resistance*, or proof of *threatened resistance*, to the execution of process or other performance of official duty.

725. If it appears to the Governor that the civil power of any county is not sufficient to enable the Sheriff to execute process delivered to him, he must, upon the application of the Sheriff of the county, order such portion as shall be sufficient, or the whole, if necessary, of the organized National Guard or enrolled militia of the State, to proceed to the assistance of the Sheriff.

When Governor to order out a military force to aid in executing process.

NOTE.—This section was amended so as to read as published in the text, by Act of April 1st, 1872, cited in note, in lieu of Sec. 433, ante. The correct reading of this section is: “If, upon the application of the Sheriff

of the county," "it appears to the Governor," etc., so that the representations made through or by the Sheriff is the basis of the order of the Commander in Chief.

Magistrates and officers to command rioters to disperse.

726. Where any number of persons, whether armed or not, are unlawfully or riotously assembled, the Sheriff of the county and his deputies, the officials governing the town or city, or the Justices of the Peace and Constables thereof, or any of them, must go among the persons assembled, or as near to them as possible, and command them, in the name of the people of the State, immediately to disperse.

NOTE.—See note to Sec. 697, Subd. 3, and note, ante.

To arrest rioters if they do not disperse.

727. (§§ 41, 42.) If the persons assembled do not immediately disperse, such magistrates and officers must arrest them, and to that end may command the aid of all persons present or within the county.

Officers who may order out the military.

728. When there is an unlawful or riotous assembly with the intent to commit a felony or to offer violence to person or property, or to resist by force the laws of the State or of the United States, and the fact is made known to the Governor, or to any Justice of the Supreme Court, or to the District Judge of that judicial district, or to the County Judge, or Sheriff of the county, or to the Mayor of a city, or to the President of the Board of Supervisors of the cities and counties of Sacramento and San Francisco, either of those officers may issue an order directed to the commanding officer of a division or brigade of the organized National Guard or enrolled militia of the State, to order his command, or such part thereof as may be necessary, into active service, and to appear at a time and place therein specified to aid the civil authorities in suppressing violence and enforcing the laws.

Commanding officer and troops to obey the order.

729. The organized National Guard or enrolled militia, or such portion thereof as shall be called into active service, as provided in Section 728, must appear

at the time and place appointed, fully armed and equipped, and with not less than forty rounds of ball cartridge to each man, if infantry or cavalry, and with not less than twenty rounds of grape canister or round shot, if artillery.

730. When an armed force is called out for the purpose of suppressing an unlawful or riotous assembly, or arresting the offenders, and is placed under the temporary direction of any civil officer, as provided in Section 731, it must obey the orders in relation thereto of such civil officer.

Armed
force to
obey orders
of whom.

731. Whenever any portion of the National Guard, or enrolled militia, shall have been called into active service to suppress an insurrection or rebellion, to disperse a mob, or to enforce the execution of the laws of this State or of the United States, it shall be competent for the Commander in Chief, or for the General acting in his stead, to place such troops under the temporary direction of the Mayor of any city, or of the President of the Board of Supervisors of the Cities and Counties of Sacramento and San Francisco, or the person acting in that capacity, of the Sheriff of any county, or of any Marshal of the United States; and if, in the opinion of such civil officer, it shall become necessary that the troops so called out shall fire or charge upon any mob or body of persons assembled to break or resist the laws, such civil officer shall give a written order to that effect to the superior officer present in command of such troops, who will at once proceed to carry out the order, and shall direct the firing and attack to cease only when such mob or unlawful assembly shall have been dispersed, or when ordered to do so by the proper civil authority. No officer who has been called out to sustain the civil authorities shall, under any pretense, or in compliance with any order, fire blank cartridges upon any mob or

Conduct of
the troops.

Same.

unlawful assemblage, under penalty of being cashiered by sentence of a Court martial; provided, that nothing in this section shall be construed as prohibiting any such troops from firing or charging upon such mob or assembly without the orders of such civil officers, in case they shall first be attacked or fired upon, or forcibly resisted in discharge of their duty. When the Commander in Chief, or General acting in his stead, shall call troops into active service for the purposes mentioned in this section, and shall not place them under the temporary direction of any civil officer, the commanding officer shall use his own discretion with respect to the propriety of attacking or firing upon any mob or unlawful assembly.

Governor
may in
certain
cases
declare a
county in
a state of
insurrec-
tion.

732. When the Governor is satisfied that the execution of civil or criminal process has been forcibly resisted in any county by bodies of men, or that combinations to resist the execution of process by force exist in any county, and that the power of the county has been exerted and has not been sufficient to enable the officers having the process to execute it, he may, on the application of the officer, or of the District Attorney or County Judge of the county, by proclamation published in such papers as he may direct, declare the county to be in a state of insurrection, and may order into the service of the State such number and description of the organized National Guard or volunteer uniformed companies, or other militia of the State as he deems necessary, to serve for such term and under the command of such officer as he may direct.

NOTE.—The preceding Secs., 728, 729, 730, 731, 732, were amended so as to read as published in the text, by Act of April 1st, 1872, cited in note in lieu of Sec. 433, ante, repealed.

May
revoke the
proclama-
tion.

733. (§ 49.) The Governor may, when he thinks proper, revoke the proclamation authorized by the

last section, or declare that it shall cease at the time and in the manner directed by him.

NOTE.—See Art. V, Sec. 5, State Const., Appendix to Political Code.

TITLE II.

OF JUDICIAL PROCEEDINGS FOR THE REMOVAL OF PUBLIC OFFICERS BY IMPEACHMENT OR OTHERWISE.

CHAPTER I. *Of impeachments.*

II. *Of the removal of civil officers otherwise than by impeachment.*

CHAPTER I.

OF IMPEACHMENTS.

SECTION 737. Officers liable to impeachment.

738. Articles, how prepared. Trial by Senate.

739. Articles of impeachment.

740. Time of hearing. Service on defendant.

741. Service, how made.

742. Proceedings on failure to appear.

743. Defendant, after appearance, may answer or demur.

744. If demurrer is overruled defendant must answer.

745. Senate to be sworn.

746. Two thirds necessary to a conviction.

747. Judgment on conviction, how pronounced.

748. The same.

749. Nature of the judgment.

750. Effect of judgment of suspension.

751. Officer, when impeached, disqualified until acquitted.

Governor to temporarily fill vacancy.

752. Presiding officer when Lieutenant Governor is impeached.

753. Impeachment not a bar to indictment.

737. (§ 51.) The Governor, Lieutenant Governor, Secretary of State, Controller, Treasurer, Attorney

Officers
liable to
impeach-
ment.

General, Surveyor General, Justices of the Supreme Court, and Judges of the District Courts, are liable to impeachment for any misdemeanor in office.

NOTE.—Const., Art. IV, Sec. 19, declares impeachable the officers named in the text. See Journals of the Senate and Assembly for the session of 1856-7, for impeachment articles vs. the State Treasurer, and also vs. the Controller, and the rules there adopted for the government of the Court of Impeachment. This Chapter provides standing rules for such proceedings.

Articles,
how
prepared.

738. (§ 52.) All impeachments must be by resolution adopted, originated in, and conducted by managers elected by the Assembly, who must prepare articles of impeachment, present them at the bar of the Senate, and prosecute the same. The trial must be had before the Senate, sitting as a Court of impeachment.

Trial by
Senate.

NOTE.—Const., Art. IV, Sec. 18. Assembly has sole power of impeachment, and impeachments to be tried by the Senate.—See articles of impeachment in the cases of Treasurer and Controller of State, Journals of Senate and Assembly of 1856-7, Cal. Legislature. In this respect our Constitution is similar to the provisions of the Federal Constitution.—See Fed. Const., Art. I, Sec. 2, Subd. 5. House of Representatives has sole power of impeachment.—Art. I, Sec. 3, Subd. 6. Senate has sole power to try, and Art. II, Sec. 4, declares who may be impeached.—See "Chase's trial," "Trial of Judge Peck," Proceedings vs. Judge Humphrey, June 26th, 1862, Cong. Globe, Part 4, second session thirty-second Congress, pp. 2942-2953; see, also, impeachment of Andrew Johnson, President of the United States, Congress of 1867-8.

Articles of
impeach-
ment.

739. (§ 53.) When an officer is impeached by the Assembly for a misdemeanor in office, the articles of impeachment must be delivered to the President of the Senate.

Time of
hearing.

740. (§ 54.) The Senate must assign a day for the hearing of the impeachment and inform the Assembly thereof. The President of the Senate must cause a copy of the articles of impeachment, with a notice to

Service on
defendant.

appear and answer the same at the time and place appointed, to be served on the defendant not less than ten days before the day fixed for the hearing.

741. (§ 55.) The service must be made upon the defendant personally, or if he cannot, upon diligent inquiry, be found within the State, the Senate, upon proof of that fact, may order publication to be made, in such manner as it may deem proper, of a notice requiring him to appear at a specified time and place and answer the articles of impeachment. Service,
how made.

NOTE.—Sec. 259, Political Code Cal., provides that the Sergeant-at-Arms must “execute” all “process” issued by the authority of the Senate. This is the practice of the U. S. Senate, and the return is made under oath.—See Bouv. Law Dict., Vol. 1, p. 686.

742. (§ 56.) If the defendant does not appear, the Senate, upon proof of service or publication, as provided in the two last sections, may, of its own motion or for cause shown, assign another day for hearing the impeachment, or may proceed, in the absence of the defendant, to trial and judgment. Proceed-
ings on
failure to
appear.

NOTE.—Practice of the U. S. Senate.—See Bouv. Law Dict., p. 686, note 5.

743. (§ 57.) When the defendant appears, he may in writing object to the sufficiency of the articles of impeachment, or he may answer the same by an oral plea of not guilty, which plea must be entered upon the journal, and puts in issue every material allegation of the articles of impeachment. Defendant,
after
appear-
ance, may
answer or
demur.

744. (§§ 58, 59.) If the objection to the sufficiency of the articles of impeachment is not sustained by a majority of the members of the Senate who heard the argument, the defendant must be ordered forthwith to answer the articles of impeachment. If he then pleads guilty, or refuses to plead, the Senate must render judgment of conviction against him. If he plead not guilty, If demur-
rer is
overruled
defendant
must
answer.

the Senate must, at such time as it may appoint, proceed to try the impeachment.

Senate to
be sworn.

745. (§ 60.) At the time and place appointed, and before the Senate proceeds to act on the impeachment, the Secretary must administer to the President of the Senate, and the President of the Senate to each of the members of the Senate then present, an oath truly and impartially to hear, try, and determine the impeachment; and no member of the Senate can act or vote upon the impeachment, or upon any question arising thereon, without having taken such oath.

Two thirds
necessary
to a
conviction.

746. (§ 62.) The defendant cannot be convicted on an impeachment without the concurrence of two thirds of the members present, voting by ayes and noes; and if two thirds of the members present do not concur in a conviction, he must be acquitted.

NOTE.—See Practice U. S. Senate, and constitutional provisions and cases cited in preceding notes.

Judgment
on conviction,
how pronounced

747. (§ 63.) After conviction the Senate must, at such time as it may appoint, pronounce judgment, in the form of a resolution entered upon the journals of the Senate.

Same.

748. (§ 64.) On the adoption of the resolution by a majority of the members present who voted on the question of acquittal or conviction, it becomes the judgment of the Senate.

Nature
of the
judgment.

749. (§ 65.) The judgment may be that the defendant be suspended and removed from office, or that he be removed from office and disqualified to hold and enjoy a particular office, or class of offices, or any office in this State.

NOTE.—See Const., Art. IV, Sec. 19. The party convicted or acquitted is also liable to indictment, trial, and punishment, according to law.

750. (§ 66.) If judgment of suspension is given, the defendant, during the continuance thereof, is disqualified from receiving the salary, fees, or emoluments of the office.

Effect of
judgment
of
suspension

751. (§ 67.) Whenever articles of impeachment against any officer subject to impeachment are presented to the Senate, such officer is temporarily suspended from his office, and cannot act in his official capacity until he is acquitted. Upon such suspension of any officer other than the Governor, his office must at once be temporarily filled by an appointment made by the Governor, with the advice and consent of the Senate, until the acquittal of the party impeached; or, in case of his removal, until the vacancy is filled at the next election, as required by law.

Officer,
when
impeached,
disqualified
until
acquitted.

Governor to
tempora-
rily fill
vacancy.

NOTE.—Stats. 1857, p. 17.

752. (§ 68.) If the Lieutenant Governor is impeached, notice of the impeachment must be immediately given to the Senate by the Assembly, that another President may be chosen.

Presiding
officer
when
Lieutenant
Governor is
impeached.

753. (§ 69.) If the offense for which the defendant is convicted on impeachment is also the subject of an indictment, the indictment is not barred thereby.

Impeach-
ment not
a bar to
indictment.

NOTE.—This Chapter is based on the Stats. of 1851, p. 212, et seq.; 1857, p. 17.

CHAPTER II.

OF THE REMOVAL OF CIVIL OFFICERS OTHERWISE THAN BY IMPEACHMENT.

SECTION 758. Accusation to be presented by the Grand Jury.

759. Form of accusation.

760. To be transmitted to the District Attorney, and copy served on the defendant.

761. Proceedings if defendant does not appear.

SECTION 762. Defendant may object to or deny the accusation.

763. Form of objection.

764. Manner of denial.

765. If objections overruled, defendant must answer.

766. Proceedings upon plea of guilty, refusal to answer, or denial.

767. Trial by jury.

768. State and defendant entitled to process for witnesses.

769. Judgment upon conviction, and its form.

770. Appeal, how taken. Pending appeal, defendant to be suspended and vacancy filled.

771. Proceedings for the removal of a District Attorney.

772. Removal of public officers by summary proceedings before District Courts.

Accusation
to be
presented
by the
Grand Jury

758. (§ 70.) An accusation in writing against any district, county, township, or municipal officer, for willful or corrupt misconduct in office, may be presented by the Grand Jury of the county for or in which the officer accused is elected or appointed.

NOTE.—Const., Art. IV, Sec. 19. "All other officers" (than those subject to impeachment there enumerated) shall be tried for misdemeanor in office in such a manner as the Legislature may provide.—See *People vs. Wells*, 2 Cal., p. 198; *People vs. Jewett*, 6 Cal., p. 291; *Morbury vs. Madison*, 1 Cranch, —; *U.S. vs. Guthrie*, 17 Howard, —; *Page vs. Hardin*, 8 B. Monroe Ky, —; *Avery vs. Inhab. Farmingham*, 3 Mass., p. 117; *Lehman vs. Sutherland*, 3 Serg. & Rawle, p. 145; *Field vs. The People*, Scam. Ills., p. 79. The power to remove is incident to the power to appoint, made so by the Constitution.—*People vs. Hill*, 7 Cal., p. 102; *People vs. Mizner*, 7 Cal., p. 522; *People vs. Squiers*, 14 Cal., p. 15; *Christy vs. Bd. Sup. Sac. Co.*, 39 Cal., p. 3.

Form of
accusation.

759. (§ 71.) The accusation must state the offense charged, in ordinary and concise language, and without repetition.

To be
transmit-
ted to the
District
Attorney,
and copy
served
on the
defendant.

760. (§ 72.) The accusation must be delivered by the foreman of the Grand Jury to the District Attorney of the county, ~~except~~ when he is the officer accused, who must cause a copy thereof to be served upon the defendant, and require, by notice in writing

of not less than ten days, that he appear before the District Court of the county, at its next term, and answer the accusation. The original accusation must then be filed with the Clerk of the District Court.

See
890

761. (§ 73.) The defendant must appear at the time appointed in the notice and answer the accusation, unless for some sufficient cause the Court assign another day for that purpose. If he does not appear, the Court may proceed to hear and determine the accusation in his absence.

Proceed-
ings if
defendant
does not
appear.

762. (§ 74.) The defendant may answer the accusation either by objecting to the sufficiency thereof, or of any article therein, or by denying the truth of the same.

Defendant
may object
to or
deny the
accusation.

763. (§ 75.) If he objects to the legal sufficiency of the accusation, the objection must be in writing, but need not be in any specific form, it being sufficient if it presents intelligibly the grounds of the objection.

Form of
objection.

764. (§ 76.) If he denies the truth of the accusation, the denial may be oral and without oath, and must be entered upon the minutes.

Manner of
denial.

765. (§ 77.) If an objection to the sufficiency of the accusation is not sustained, the defendant must answer thereto forthwith.

If
objections
overruled,
defendant
must
answer.

766. (§ 78.) If the defendant pleads guilty, or refuses to answer the accusation, the Court must render judgment of conviction against him. If he denies the matters charged, the Court must immediately, or at such time as it may appoint, proceed to try the accusation.

Proceed-
ings upon
plea of
guilty,
refusal to
answer, or
denial.

767. (§ 79.) The trial must be by a jury, and conducted in all respects in the same manner as the trial of an indictment for a misdemeanor.

Trial by
jury.

State and
defendant
entitled to
process for
witnesses.

768. (§ 80.) The District Attorney and the defendant are respectively entitled to such process as may be necessary to enforce the attendance of witnesses as upon a trial of an indictment.

Judgment
upon
conviction,
and its
form.

769. (§ 81.) Upon a conviction, the Court must, at such time as it may appoint, pronounce judgment that the defendant be removed from office; but, to warrant a removal, the judgment must be entered upon the minutes, and the causes of removal must be assigned therein.

NOTE.—Stats. 1863, p. 158.

Appeal,
how taken.

770. (§ 82.) From a judgment of removal an appeal may be taken to the Supreme Court, in the same manner as from a judgment in a civil action; but until such judgment is reversed the defendant is suspended from his office. Pending the appeal, the office must be filled as in case of a vacancy.

Pending
appeal,
defendant
to be
suspended
and
vacancy
filled.

Proceed-
ings for the
removal of
a District
Attorney.

771. (§ 83.) The same proceedings may be had on like grounds for the removal of a District Attorney, except that the accusation must be delivered by the foreman of the Grand Jury to the Clerk, and by him to the District Judge of the district, who must thereupon appoint some one to act as prosecuting officer in the matter, or place the accusation in the hands of the District Attorney of an adjoining county, and require him to conduct the proceedings.

NOTE.—This Chapter is based on the Stats. of 1851, p. 212, et seq; and 1863, p. 158.

Removal
of public
officers by
summary
proceed-
ings before
District
Courts.

772. When an information in writing verified by the oath of any person, is presented to a District Court, alleging that any officer within the jurisdiction of the Court has been guilty of charging and collecting illegal fees for services rendered or to be rendered in his office, or has refused or neglected to perform the official duties pertaining to his office, the Court

must cite the party charged to appear before the Court at a time not more than ten nor less than five days from the time the information was presented, and on that day or some other subsequent day, not more than twenty days from that ~~on~~ which the information was presented, must proceed to hear, in a summary manner, the information and evidence offered in support of the same, and the answer and evidence offered by the party informed against; and if on such hearing it appears that the charge is sustained, the Court must enter a decree that the party informed against be deprived of his office, and must enter a judgment for five hundred dollars in favor of the informer, and such costs as are allowed in civil cases.

NOTE.—Stats. 1853, p. 40, Sec. 4. ———— X.

TITLE III.

OF THE PROCEEDINGS IN CRIMINAL ACTIONS PROSECUTED BY INDICTMENT, TO THE COMMITMENT, INCLUSIVE.

CHAPTER I. *Of the local jurisdiction of public offenses.*

II. *Of the time of commencing criminal actions.*

III. *The information.*

IV. *The warrant of arrest.*

V. *Arrest, by whom and how made.*

VI. *Retaking after an escape or rescue.*

VII. *Examination of the case and discharge of defendant, or holding him to answer.*

CHAPTER I.

OF THE LOCAL JURISDICTION OF PUBLIC OFFENSES.

SECTION 777. Jurisdiction of offenses committed in this State.

778. When the offense is commenced without, but consummated within this State.

779. When an inhabitant of this State is concerned in a duel out of the same, and a party wounded dies therein.

780. When an inhabitant leaves the State to evade the statute against dueling or challenges to fight.

781. When an offense is committed partly in one county and partly in another.

782. When committed on the boundary, etc., of two or more counties.

783. Jurisdiction of an offense on board a vessel.

784. Of indictment for kidnapping, enticing away a child, or abduction.

785. Jurisdiction of an indictment for bigamy or incest.

786. When property is feloniously taken in one county and brought into another.

787. Jurisdiction of indictment for escaping from prison.

788. Jurisdiction of an indictment for treason, when the overt act is committed out of the State.

789. Jurisdiction of an indictment for stealing, etc., property out of this State and bringing it therein.

790. Jurisdiction of an indictment for murder, etc., where the injury was inflicted in one county, and the party dies out of that county.

791. Of an indictment against an accessory.

792. Jurisdiction in cases of principals who are not present, etc., at commission of the principal offense.

793. Conviction or acquittal in another State a bar, where the jurisdiction is concurrent.

794. Conviction or acquittal in another county a bar, where the jurisdiction is concurrent.

Jurisdiction of offenses committed in this State.

777. (§ 84.) Every person is liable to punishment by the laws of this State, for a public offense committed by him therein, except where it is by law cognizable exclusively in the Courts of the United States.

NOTE.—Of jurisdiction in the State Courts, and the concurrent jurisdiction of the State and Federal Courts, and the distinction existing between them, see Code of Civil Procedure Cal., Sec. 33, and notes. *Jurisdiction of the person* is that obtained by the appearance of the

defendant before the tribunal.—Bouv. Law Dict., Vol. 1, p. 769; 9 Mass., p. 462. *Territorial jurisdiction* is the power of the tribunal considered with reference to the territory within which it is to be exercised.—Id. et id. It has been long settled, more especially in criminal law and practice, that consent confers no jurisdiction; it is the gift of the law. The jurisdiction of the text is that of the law. In the case of *The People vs. Quinn*, 18 Cal., p. 122, it was held that unless it was so declared directly in the law repealing a criminal statute, an indictment or prosecution pending under it at the time of the repeal, is not superseded or barred.—See Sec. 6, ante; *People vs. Fowler*, 9 id., p. 85. As to the criminal jurisdiction of the Courts of this State, see Art. VI, State Const., Sec. 6. District Courts have jurisdiction “in all criminal cases not otherwise provided for.” Sec. 8—County Courts have “such criminal jurisdiction as the Legislature may prescribe.” Sec. 9—Justices jurisdiction not to trench on that of Courts of record; their powers and duties to be fixed by law.—See, also, as to other tribunals, id., and Sec. 10; *People vs. Blackwell*, 27 Cal., p. 65; *People vs. Binney*, 29 id., p. 459; *People vs. Johnson*, 30 id., p. 98. State tribunals have no power to punish crimes against the laws of the United States *as such*.—*People vs. Kelly*, 38 Cal., p. 145. State Courts have no jurisdiction of a charge of perjury committed by swearing falsely before the Register of the U. S. Land Office in a proceeding relating to the public lands of the United States.—Id.

778. (§ 85.) When the commission of a public offense, commenced without the State, is consummated within its boundaries; the defendant is liable to punishment therefor in this State, though he was out of the State at the time of the commission of the offense charged. If he consummated it in this State, through the intervention of an innocent or guilty agent, or any other means proceeding directly from himself, in such case the jurisdiction is in the county in which the offense is consummated.

When the offense is commenced without, but consummated within this State.

NOTE.—See *Adams vs. The People*, 1 Comst., p. 173. This principle has been much discussed and many doubts expressed as to its propriety, but it was finally settled in the case above cited; reported also in 3 Denio, p. 190.

When an inhabitant of this State is concerned in a duel out of the same, and a party wounded dies therein

779. (§ 86.) When an inhabitant or resident of this State, by previous appointment or engagement, fights a duel or is concerned as second therein, out of the jurisdiction of this State, and in the duel a wound is inflicted upon a person, whereof he dies in this State, the jurisdiction of the offense is in the county where the death happens.

When an inhabitant leaves the State to evade the statute against dueling or challenges to fight.

780. When an inhabitant of this State leaves the same for the purpose of evading the operation of the provisions of the Code relating to dueling and challenges to fight, with the intent or for the purpose of doing any of the acts prohibited therein, the jurisdiction is in the county of which the offender was an inhabitant when the offense was committed.

NOTE.—N. Y. C. Cr. Pr., Sec. 130.

When an offense is committed partly in one county and partly in another.

781. (§ 87.) When a public offense is committed in part in one county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county.

NOTE.—This section has the indorsement of the Mass. and N. Y. Code Commission.—Mass., Chap. 3, Sec. 4; N. Y., Sec. 131, Cr. Pro.

When committed on the boundary, etc., of two or more counties.

782. (§ 88.) When a public offense is committed on the boundary of two or more counties, or within five hundred yards thereof, the jurisdiction is in either county.

Jurisdiction of an offense on board a vessel.

783. (§ 89.) When an offense is committed in this State, on board a vessel navigating a river, bay, slough, lake, or canal, or lying therein in the prosecution of her voyage, the jurisdiction is in any county through which the vessel is navigated in the course of her voyage, or in the county where the voyage terminates.

NOTE.—Conforms to the construction given to a similar section, without the words, “or lying therein in the prosecution of her voyage,” by the Supreme Court N. Y., in *People vs. Hulse*, 3 Hill., p. 309.

784. (§ 90.) The jurisdiction of an indictment:

1. For forcibly and without lawful authority seizing and confining another, or inveigling or kidnapping him with intent, against his will, to cause him to be secretly confined or imprisoned in this State, or to be sent out of the State, or from one county to another, or to be sold as a slave, or in any way held to service; or,

2. For decoying, taking, or enticing away a child under the age of twelve years, with intent to detain and conceal it from its parent, guardian, or other person having the lawful charge of the child; or,

3. For inveigling, enticing, or taking away an unmarried female of previous chaste character, under the age of twenty-five years, for the purpose of prostitution; or,

4. For taking away any female under the age of sixteen years, from her father, mother, guardian, or other person having the legal charge of her person, without their consent, either for the purpose of concubinage or prostitution;

—Is in the county in which the offense is committed, or out of which the person upon whom the offense was committed may, in the commission of the offense, have been brought, or in which an act was done by the defendant in instigating, procuring, promoting, or aiding in the commission of the offense, or in abetting the parties concerned therein.

Of indictment for kidnapping, enticing away a child, or abduction.

NOTE.—The first subdivision of this section substantially conforms to Sec. 90 of the Criminal Practice Act of 1851. See, also, Sec. 207, ante.

Subds. 2 and 3 are inserted because the same principle applies.—See Part I of this Code, Secs. 266, 267, and 278; also, New York Code of Criminal Procedure,

Sec. 134. The same principle applies to decoying away children and abduction. It was recommended in Mass., Chap. III, Sec. 11.

Jurisdiction of an indictment for bigamy or incest.

785. (§ 91.) When the offense, either of bigamy or incest, is committed in one county and the defendant is apprehended in another, the jurisdiction is in either county.

When property is feloniously taken in one county and brought into another.

786. (§ 92.) When property taken in one county by burglary, robbery, larceny, or embezzlement, has been brought into another, the jurisdiction of the offense is in either county. But if at any time before the conviction of the defendant in the latter, he is indicted in the former county, the Sheriff of the latter county must, upon demand, deliver him to the Sheriff of the former.

NOTE.—The case of *The People vs. Mason*, 9 Wend., p. 505, suggests the latter sentence.

Jurisdiction of indictment for escaping from prison.

787. The jurisdiction of an indictment for escaping from prison is in any county of the State.

NOTE.—Stats. 1855, p. 203, Sec. 1.

Jurisdiction of an indictment for treason, when the overt act is committed out of the State.

788. The jurisdiction of an indictment for treason, when the overt act is committed out of the State, is in any county of the State.

NOTE.—Stats. 1850, p. 229, Sec. 17.

Jurisdiction of an indictment for stealing, etc., property out of this State and bringing it therein.

789. The jurisdiction of an indictment for stealing in any other State the property of another, or receiving it, knowing it to have been stolen, and bringing the same into this State, is in any county into or through which such stolen property has been brought.

Jurisdiction of an indictment for murder, etc., where the injury was inflicted in one county, and the party dies out of that county.

790. The jurisdiction of an indictment for murder or manslaughter, when the injury which caused the death was inflicted in one county and the party injured dies in another county, or out of the State, is in the county where the injury was inflicted.

NOTE.—Stats. 1850, p. 229, Sec. 28.

791. (§ 93.) In the case of an accessory in the commission of a public offense, the jurisdiction is in the county where the offense of the accessory was committed, notwithstanding the principal offense was committed in another county.

Of an indictment against an accessory.

NOTE.—The distinction between an accessory *before* the fact and the principal being abolished by this Code, and the word “accessory” substituted for “accessory after the fact,” this section has been modified to adapt it to the changes made.—See note to Secs. 31, 32, ante.

792. The jurisdiction of an indictment against a principal in the commission of a public offense, when such principal is not present at the commission of the principal offense, is in the same county it would be under this Code if he were so present and aiding and abetting therein.

Jurisdiction in cases of principals who are not present, etc., at commission of the principal offense.

NOTE.—Expedient because the distinction between accessories before the fact and principals is abolished by this Code.

793. (§ 94.) When an act charged as a public offense is within the jurisdiction of another State or country, as well as of this State, a conviction or acquittal thereof in the former is a bar to the prosecution or indictment therefor in this State.

Conviction or acquittal in another State a bar, where the jurisdiction is concurrent.

794. (§ 95.) When an offense is within the jurisdiction of two or more counties, a conviction or acquittal thereof in one county is a bar to a prosecution or indictment therefor in another.

Conviction or acquittal in another county a bar, where the jurisdiction is concurrent.

795. The jurisdiction of a violation of sections 412, 413 and 414 of the Penal Code, or a conspiracy to violate either of said sections, is in any county, first, in which the act is done toward the commission of the offense; second, into, out of, or through which the offender used to commit the offense; or, third, where the offender is arrested. [Approved March 7, 1874; “the State.”]

ACTIONS.

needed at any time.

colonies.

rs.

the State.

803. Indictment found, where

and filed.

Prosecution for murder may be commenced at any time.

799. (§ 96.) There is no limitation of time within which a prosecution for murder must be commenced. It may be commenced at any time after the death of the person killed.

799. As against murder, whether of the first or second degree, there is no limitation. *People v. Haun*, 44 Cal. 96.

Limitation of three years in all other felonies.

800. (§ 97.) An indictment for any other felony than murder must be found within three years after its commission.

NOTE.—*People vs. Miller*, 12 Cal., p. 294; *People vs. Haun*, July Term, 1872.

Limitation of one year in misdemeanors.

801. (§ 98.) An indictment for any misdemeanor must be found within one year after its commission.

Exception when defendant is out of the State.

802. (§ 99.) If, when the offense is committed, the defendant is out of the State, the indictment may be found within the term herein limited after his coming within the State, and no time during which the defendant is not an inhabitant of, or usually resident within the State, is part of the limitation.

NOTE.—The statute excludes from computation the time the defendant may be out of the State, but the rule is that this exception must be stated in the pleading. Prima facie lapse of time is a good defense, and if the statutory exception is relied upon the State should set it up.—*People vs. Miller*, 12 Cal., p. 295; *State vs. Bockwith*, 1 Stewart, p. 318; *Shelton vs. State*, 1 Stewart & Por., p. 208; 1 Chitty Cr. Law, p. 253; *People vs. Montejo*, 18 Cal., p. 38.

Indictment found, when presented and filed.

803. (§ 100.) An indictment is found, within the meaning of this Chapter, when it is presented by the Grand Jury in open Court, and there received and filed.

CHAPTER III.

THE INFORMATION.

SECTION 806. Information defined.

807. Magistrate defined.

808. Who are magistrates.

806. (§ 101.) The information is the allegation in writing made to a magistrate that a person has been guilty of some designated offense. Information defined

807. (§ 102.) A magistrate is an officer having power to issue a warrant for the arrest of a person charged with a public offense. Magistrate defined.

NOTE.—The definition of the term "Magistrate," as used throughout this Code, is here given to save unnecessary repetition of the official names of the officers who come within this description.

808. (§ 103.) The following persons are magistrates: Who are magistrates

1. The Justices of the Supreme Court;
2. The District Judges;
3. The County Judges;
4. The Judge of the Municipal Criminal Court of San Francisco;
5. Justices of the Peace;
6. Police magistrates in towns or cities.

CHAPTER IV.

THE WARRANT OF ARREST.

SECTION 811. Examination of the prosecutor and his witnesses upon the information.

812. Depositions, what to contain.

813. When warrant may issue.

814. Form of warrant.

815. Name or description of the defendant in the warrant, and statement of the offense.

816. Warrant to be directed to and executed by peace officer.

817. Who are peace officers.

818. To what peace officers warrants are to be directed.

819. Same; and when and how executed in another county.

820. Indorsement on the warrant, for service in another county, how and upon what proof to be made.

821. Defendant to be taken before the magistrate issuing the warrant, etc.

SECTION 822. Defendant arrested for misdemeanor in another county, to be admitted to bail.

823. Proceedings on taking bail from the defendant in such cases.

824. When bail is not given. When magistrate who issued warrant cannot act.

825. No delay in taking defendant before magistrate.

826. Proceedings where defendant is taken before another magistrate.

827. Proceedings for offenses triable in another county.

828. Duty of officer.

829. Admission to bail.

Examina-
tion of the
prosecutor
and his
witnesses
upon the
informa-
tion.

811. (§ 104.) When an information is laid before a magistrate of the commission of a public offense, triable within the county, he must examine on oath the informant or prosecutor, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them.

Deposi-
tions, what
to contain.

812. (§ 105.) The deposition must set forth the facts stated by the prosecutor and his witnesses, tending to establish the commission of the offense and the guilt of the defendant.

When
warrant
may issue.

813. (§ 106.) If the magistrate is satisfied therefrom that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, he must issue a warrant of arrest.

Form of
warrant.

814. (§ 107.) A warrant of arrest is an order in writing, in the name of the people, signed by a magistrate, commanding the arrest of the defendant, and may be substantially in the following form :

COUNTY OF —.

The People of the State of California to any Sheriff, Constable, Marshal, or Policeman of said State, or of the County of — :

Information on oath having been this day laid before me, by A. B., that the crime of — (designating it)

has been committed, and accusing C. D. thereof, you are therefore commanded forthwith to arrest the above named C. D. and bring him before me at (naming the place), or in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at —, this — day of —, eighteen —.

NOTE.—The officer making the arrest may take the party before another Justice of the Peace, of the same county, who may make the examination and commit, in case of the absence or inability to act of the Justice issuing the warrant; and it is not essential to this end that the warrant contain such a direction.—Ex Parte Branigan, 19 Cal., p. 133.

815. (§ 108.) The warrant must specify the name of the defendant, or, if it is unknown to the magistrate, the defendant may be designated therein by any name. It must also state the time of issuing it, and the county, city, or town where it is issued, and be signed by the magistrate, with his name of office.

Name or description of the defendant in the warrant, and statement of the offense.

816. (§ 109.) The warrant must be directed to and executed by a peace officer.

Warrant to be directed to and executed by peace officer.

817. (§ 110.) A peace officer is a Sheriff of a county, or a Constable, Marshal, or Policeman of a township, city, or town.

Who are peace officers.

818. (§ 111.) If a warrant is issued by a Justice of the Supreme Court, District Judge, County Judge, or Judge of the Municipal Criminal Court of San Francisco, it may be directed generally to any Sheriff, Constable, Marshal, or Policeman in the State, and may be executed by any of those officers to whom it may be delivered.

To what peace officers warrants are to be directed.

819. (§ 112.) If it is issued by any other magistrate, it may be directed generally to any Sheriff, Constable, Marshal, or Policeman in the county in which it is issued, and may be executed in that county; or, if the defendant is in another county, it may be executed

Same; and when and how executed in another county.

therein upon the written direction of a magistrate of that county, indorsed upon the warrant, signed by him, with his name of office, and dated at the county, city, or town where it is made, to the following effect: "This warrant may be executed in the County of ——" (naming the county.)

Indorsement on the warrant, for service in another county, how and upon what proof to be made.

820. (§ 113.) The indorsement mentioned in the last section cannot, however, be made, unless the warrant of arrest be accompanied with a certificate of the Clerk of the county where such warrant was issued, under the seal of the County Court thereof, as to the official character of the magistrate; or unless upon the oath of a credible witness, in writing, indorsed on or annexed to the warrant, proving the handwriting of the magistrate by whom it was issued. Upon such proof, the magistrate indorsing the warrant is exempted from liability to a civil or criminal action, though it afterwards appear that the warrant was illegally or improperly issued.

Defendant to be taken before the magistrate issuing the warrant, etc.

821. (§ 114.) If the offense charged is a felony, the officer making the arrest must take the defendant before the magistrate who issued the warrant, or some other magistrate of the same county, as provided in Section 824.

Defendant arrested for misdemeanor in another county, to be admitted to bail.

822. (§ 115.) If the offense charged is a misdemeanor, and the defendant is arrested in another county, the officer must, upon being required by the defendant, take him before a magistrate in that county, who must admit the defendant to bail, and take bail from him accordingly.

Proceedings on taking bail from the defendant in such cases.

823. (§ 116.) On taking the bail, the magistrate must certify that fact on the warrant, and deliver the warrant and undertaking of bail to the officer having charge of the defendant. The officer must then discharge the defendant from arrest, and must, without

delay, deliver the warrant and undertaking to the Clerk of the Court at which the defendant is required to appear.

824. (§§ 117, 118.) If, on the admission of the defendant to bail, the bail is not forthwith given, the officer must take the defendant before the magistrate who issued the warrant, or, in case of his absence or inability to act, before the nearest or most accessible magistrate in the same county, and must at the same time deliver to the magistrate the warrant, with his return thereon indorsed and subscribed by him.

When bail is not given. When magistrate who issued warrant cannot act.

825. (§ 119.) The defendant must in all cases be taken before the magistrate without unnecessary delay.

No delay in taking defendant before magistrate

826. (§ 120.) If the defendant is brought before a magistrate other than the one who issued the warrant, the depositions on which the warrant was granted must be sent to that magistrate, or, if they cannot be procured, the prosecutor and his witnesses must be summoned to give their testimony anew.

Proceedings where defendant is taken before another magistrate

827. (§ 121.) When an information is laid before a magistrate of the commission of a public offense triable in another county of the State, but showing that the defendant is in the county where the information is laid, the same proceedings must be had as prescribed in this Chapter, except that the warrant must require the defendant to be taken before the nearest or most accessible magistrate of the county in which the offense is triable, and the depositions of the informant or prosecutor, and of the witnesses who may have been produced, must be delivered by the magistrate to the officer to whom the warrant is delivered.

Proceedings for offenses triable in another county.

828. (§ 122.) The officer who executes the warrant must take the defendant before the nearest or most accessible magistrate of the county in which the offense is triable, and must deliver to him the deposi-

Duty of officer.

tions and the warrant, with his return indorsed thereon, and the magistrate must then proceed in the same manner as upon a warrant issued by himself.

Admission
to bail.

829. (§ 123.) If the offense charged in the warrant issued pursuant to Section 827 is a misdemeanor, the officer must, upon being required by the defendant, take him before a magistrate of the county in which the warrant was issued, who must admit the defendant to bail, and immediately transmit the warrant, depositions, and undertaking, to the Clerk of the Court in which the defendant is required to appear.

829. Within the meaning of the Criminal Practice Act, a prisoner released on bail is not imprisoned during such release. *Ex parte Jones & Ellwood*, 41 Cal. 209.

CHAPTER V.

ARREST, BY WHOM AND HOW MADE.

SECTION 834. Arrest defined. By whom made.

835. How an arrest is made and what restraint allowed.

836. Arrests by peace officers.

837. Arrests by private persons.

838. Magistrates may order arrest.

839. Persons making arrest may summon assistance.

840. When the arrest may be made.

841. Arrest, how made.

842. Warrant must be shown, when.

843. What force may be used.

844. Doors and windows may be broken, when.

845. Same.

846. Weapons may be taken from persons arrested.

847. Duty of a private person who has made an arrest.

848. Duty of officer arresting with warrant.

849. Person arrested without a warrant to be taken before a magistrate. Information to be filed.

850. Arrest by telegraph.

851. Same.

Arrest
defined.
By whom
made.

834. An arrest is taking a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person.

835. An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of an officer. The defendant must not be subjected to any more restraint than is necessary for his arrest and detention.

How an arrest is made and what restraint allowed.

836. A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

Arrests by peace officers.

1. For a public offense committed or attempted in his presence.

2. When a person arrested has committed a felony, although not in his presence.

3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.

5. At night, when there is reasonable cause to believe that he has committed a felony.

837. A private person may arrest another:

1. For a public offense committed or attempted in his presence.

Arrests by private persons.

2. When the person arrested has committed a felony, although not in his presence.

3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.

838. A magistrate may orally order a peace officer or private person to arrest any one committing or attempting to commit a public offense in the presence of such magistrate.

Magistrates may order arrest.

839. Any person making an arrest may orally summon as many persons as he deems necessary to aid him therein.

Persons making arrest may summon assistance.

When the
arrest may
be made.

840. If the offense charged is a felony, the arrest may be made on any day, and at any time of the day or night. If it is a misdemeanor, the arrest cannot be made at night, unless upon the direction of the magistrate, indorsed upon the warrant.

Arrest,
how made.

841. The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or is pursued immediately after its commission, or after an escape.

NOTE.—Where a party is arrested in the commission of an offense, or upon fresh pursuit afterwards, notice of the official character of the person making the arrest, or of the cause of arrest, is not necessary.—People vs. Poole, 27 Cal., p. 572. In the same case it was held that if after the commission of a felony the guilty parties flee, and within three or four hours are pursued by officers, and the officers, by diligent pursuit, overtake them at a distance of twelve miles from where the crime was committed, this was an immediate or fresh pursuit.

Warrant
must be
shown,
when.

842. If the person making the arrest is acting under the authority of a warrant, he must show the warrant, if required.

What force
may be
used.

843. When the arrest is being made by an officer under the authority of a warrant, after information of the intention to make the arrest, if the person to be arrested either flees or forcibly resists, the officer may use all necessary means to effect the arrest.

Doors and
windows
may be
broken,
when.

844. To make an arrest, a private person, if the offense be a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired.

845. Any person who has lawfully entered a house for the purpose of making an arrest, may break open the door or window thereof if detained therein, when necessary for the purpose of liberating himself, and an officer may do the same, when necessary for the purpose of liberating a person who, acting in his aid, lawfully entered for the purpose of making an arrest, and is detained therein. Same.

846. Any person making an arrest may take from the person arrested all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken. Weapons may be taken from persons arrested.

847. A private person who has arrested another for the commission of a public offense must, without unnecessary delay, take the person arrested before a magistrate, or deliver him to a peace officer. Duty of a private person who has made an arrest.

848. An officer making an arrest, in obedience to a warrant, must proceed with the person arrested as commanded by the warrant, or as provided by law. Duty of officer arresting with warrant.

849. When an arrest is made without a warrant by a peace officer or private person, the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and an information, stating the charge against the person, must be laid before such magistrate. Person arrested without a warrant to be taken before a magistrate.

NOTE.—The preceding Chapter is founded upon Sections 124-143, inclusive, of the Criminal Practice Act of this State.

850. A Justice of the Supreme Court, District or County Judge, or the Judge of the Municipal Criminal Court of San Francisco, may, by an indorsement under his hand upon a warrant of arrest, authorize the service thereof by telegraph, and thereafter a telegraphic copy Arrest by telegraph.

of such warrant may be sent by telegraph to one or more peace officers, and such copy is as effectual in the hands of any officer; and he must proceed in the same manner under it as though he held an original warrant issued by the magistrate making the indorsement.

NOTE.—Stats. 1862, p. 288.

Same.

851. Every officer causing telegraphic copies of warrants to be sent, must certify as correct, and file in the telegraph office from which such copies are sent, a copy of the warrant and indorsement thereon, and must return the original with a statement of his action thereunder.

CHAPTER VI.

RETAKING AFTER AN ESCAPE OR RESCUE.

SECTION 854. May be at any time or in any place in the State.

855. May break open door or window if admittance refused.

May be at any time or in any place in the State.

854. (§ 144.) If a person arrested escape or is rescued, the person from whose custody he escaped or was rescued, may immediately pursue and retake him at any time and in any place within the State.

May break open door or window if admittance refused.

855. (§ 145.) To retake the person escaping or rescued, the person pursuing may break open an outer or inner door or window of a dwelling house, if, after notice of his intention, he is refused admittance.

CHAPTER VII.

EXAMINATION OF THE CASE, AND DISCHARGE OF THE DEFENDANT, OR HOLDING HIM TO ANSWER.

SECTION 858. Magistrate to inform the defendant of the charge, and his right to counsel.

SECTION 859. Time to send and sending for counsel.

860. Examination, when to proceed.

861. When to be completed. Postponement.

862. On postponement, defendant to be committed or discharged on bail.

863. Form of commitment.

864. Depositions to be read on examination and subpoenas issued.

865. Examination of witnesses to be in presence of defendant, and his right to cross-examine.

866. Examination of defendant's witnesses.

867. Exclusion and separation of witnesses.

868. Who may be present at the examination.

869. Testimony, how taken and authenticated.

870. Deposition, by whom and how kept.

871. Defendant, when and how discharged.

872. When and how to be committed.

873. Order for commitment.

874. Certificate of bail being taken.

875. Order for bail on commitment.

876. Commitment, how made and to whom delivered.

877. Form of commitment.

878. Undertaking of witnesses to appear, when and how taken.

879. Security for the appearance of witnesses, when and how required.

880. Infants and married women may be required to give security.

881. Witnesses to be committed on refusal to give security for their appearance.

882. Witness unable to give security may be conditionally examined. Not applicable to prosecutor or accomplice.

883. Magistrate to return depositions, etc., to the Court.

858. (§ 146.) When the defendant is brought before the magistrate upon an arrest, either with or without warrant, on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings.

Magistrate to inform the defendant of the charge, and his right to counsel.

NOTE.—Justice Wallace, in *Ex Parte Walsh*, on habeas corpus, 39 Cal., p. 705, held that the practice prevalent of allowing the defendant to waive a preliminary examination of the charge is not authorized by statute, and ought not to be encouraged.

858. The Act to regulate proceedings before committing magistrates contains no provision authorizing or permitting an oath to be administered to the person accused. He is not to be examined generally, nor cross-examined at all. *People v. Gibbons*, 43 Cal. 557. The Act of 1866, authorizing accused persons to become witnesses in their own behalf, is not applicable to preliminary examination. *Id.* "Charge" in preliminary examination and in indictments distinguished. *Ex parte*

Time to
send and
sending for
counsel.

859. (§ 147.) He must also allow the defendant a reasonable time to send for counsel, and postpone the examination for that purpose, and must, upon the request of the defendant, require a peace officer to take a message to any counsel in the township or city the defendant may name. The officer must, without delay and without fee, perform that duty.

Examina-
tion, when
to proceed.

860. (§ 148.) If the defendant requires the aid of counsel, the magistrate must, immediately after the appearance of counsel, or if, after waiting a reasonable time therefor, none appears, proceed to examine the case.

When to be
completed.

Postpone-
ment.

861. (§ 149.) The examination must be completed at one session, unless the magistrate, for good cause shown by affidavit, postpone it. The postponement cannot be for more than two days at each time, nor more than six days in all, unless by consent or on motion of the defendant.

On post-
ponement,
defendant
to be com-
mitted or
discharge
on bail.

862. (§ 150.) If a postponement is had, the magistrate must commit the defendant for examination, admit him to bail or discharge him from custody upon the deposit of money as provided in this Code, as security for his appearance at the time to which the examination is postponed.

Form of
commit-
ment.

863. (§ 151.) The commitment for examination is made by an indorsement, signed by the magistrate on the warrant of arrest, to the following effect: "The within named A. B. having been brought before me under this warrant, is committed for examination to the Sheriff of —." If the Sheriff is not present, the defendant may be committed to the custody of a peace officer.

Depositions
to be read
on exami-
nation and
subpoenas
issued.

864. (§ 152.) At the examination, the magistrate must first read to the defendant the depositions of the witnesses examined on taking the information. He

Testimony
how taken
and
authenti-
cated.

869. (§ 162.) The testimony given by each witness must be reduced to writing, as a deposition, by the magistrate, or under his direction, and authenticated, in the following form:

1. It must state the name of the witness, his place of residence, and his business or profession.

2. It must contain the questions ~~put~~ to the witness and his answers thereto, each answer being distinctly read to him as it is taken down, and being corrected or added to until it conforms to what he declares is the truth.

3. If a question put be objected to on either side and overruled, or the witness declines answering it, that fact, with the ground on which the question was overruled or the answer declined, must be stated.

4. The deposition must be signed by the witness, or if he refuses to sign it, his reason for refusing must be stated in writing as he gives it.

5. It must be signed and certified by the magistrate.

NOTE.—The Criminal Practice Act of 1851 contained a section (162) substantially the same as the above. It was repealed in 1855 (Stats. 1855, p. 269), for the reason that it imposed too much labor upon the examining magistrate—a reason that would be equally potential if applied to any provision of the Criminal Code. The Commissioners have restored the section for many reasons:

1. The examination is had in the presence of the defendant, who could exercise his right of cross-examination, and, therefore, if the witness afterward die or cannot be found in the State, his evidence is available to either party. Under these provisions, taken in connection with Sec. 882, it will seldom be necessary to detain a witness in custody.

2. The testimony taken by the State is open to the inspection of the defendant or his attorney, and will aid materially in the preparations for trial.

3. The testimony taken by the defense enables the District Attorney, who is seldom present at the preliminary examination, to prepare the case for trial.

4. The examination is usually had at once; the testimony is more reliable; and, when once reduced to writing, precludes tampering with the witnesses.

5. Every Justice of the Peace in the State is an examining magistrate, and may hold a person to answer for any offense. The action of a Justice of the Peace is final upon the question of "sufficient cause," unless the testimony is reduced to writing, and can be presented to the Judge on habeas corpus as evidence that there was *not* "sufficient cause" to believe the defendant guilty of the offense charged.

870. The magistrate or his clerk must keep the depositions taken on the information or on the examination, until they are returned to the proper Court; and must not permit them to be examined or copied by any person except a Judge of a Court having jurisdiction of the offense, or authorized to issue writs of habeas corpus, the Attorney General, District Attorney, or other prosecuting attorney, and the defendant and his counsel.

Deposition, by whom and how kept.

NOTE.—One of the objects of this section is to keep the evidence from publication when the examination has been secret, and thus to prevent, to as great an extent as possible, the formation of a public opinion that will render the selection of a jury matter of difficulty.

871. (§ 163.) If, after hearing the proofs, it appears either that no public offense has been committed or that there is not sufficient cause to believe the defendant guilty of a public offense, the magistrate must order the defendant to be discharged, by an indorsement on the depositions and statement, signed by him, to the following effect: "There being no sufficient cause to believe the within named A. B. guilty of the offense within mentioned, I order him to be discharged."

Defendant, when and how discharged.

872. (§ 164.) If, however, it appears from the examination that a public offense ~~has been committed~~, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must indorse on the depositions an order, signed by him, to the following effect: "It appearing to me that the offense in the

When and how to be committed.

872. When a party is convicted of a criminal offense, and appeals to the County Court, and, pending the appeal, is released on bail, and the judgment is affirmed, a second commitment need only recite the judgment of conviction, and state that defendant appealed, and that judgment was affirmed. It need not recite the judgment of the County

within depositions mentioned (or any offense, according to the fact, stating generally the nature thereof), has been committed, and that there is sufficient cause to believe the within named A. B. guilty thereof, I order that he be held to answer to the same."

*Note not accurate.
See 1 Cal., 9*

NOTE.—If it appear that there is reasonable cause to believe the accused guilty of an offense, though it be a different one from that specified in the warrant of arrest, it is the duty of the Magistrate to commit him for the offense of which he appears to be guilty.—People vs. Smith, 1 Cal., p. 9. If the order of commitment be sufficient in substance, it will be held good on habeas corpus, although it contain more than is necessary.—People vs. Smith, 1 Cal., p. 9.

Order for
commitment.

873. (§ 165.) If the offense is not bailable, the following words must be added to the indorsement: "And he is hereby committed to the Sheriff of the County of —."

Certificate
of bail
being taken

874. (§ 166.) If the offense is bailable, and bail is taken by the magistrate, the following words must be added to the indorsement: "and I have admitted him to bail on the undertaking hereto annexed."

Order for
bail on
commitment.

875. (§ 167.) If the offense is bailable, and the defendant is admitted to bail, but bail has not been taken, the following words must be added to the order indorsed on the deposition: "and that he is admitted to bail in the sum of — dollars, and is committed to the Sheriff of the County of —, until he gives such bail."

Commitment, how
made and
to whom
delivered.

876. (§ 168.) If the magistrate order the defendant to be committed, he must make out a commitment, signed by him, with his name of office, and deliver it, with the defendant, to the officer to whom he is committed, or, if that officer is not present, to a peace officer, who must deliver the defendant into the proper custody, together with the commitment.

NOTE.—A commitment for larceny must state the property, its owner, its value, the time when and the place where the offense was committed. For rape it must state the person upon whom the rape was committed, and the use of violence.—*Ex Parte Branigan*, 19 Cal., p. 133. On finding a commitment illegal, if it appear that the party is guilty of an offense, the Court will not discharge him without allowing time for his arrest by proper authority.—*Ex Parte Crandall*, 2 Cal., p. 144.

commitment must be to the Form of commitment.

7. The mere recommendation of a Grand Jury that such party be detained to answer before another Grand Jury, is not of itself good cause for his detention. *Ex parte Bull*, 42 Cal. 197. The facts constituting good cause for the detention of a party, not indicted, at the next term must, in a great measure, be left to the discretion of the Court, determined by the particular circumstances of each case. *Id.*

Sheriff of

y me, that A. B. be held to answer upon a charge of (stating briefly the nature of the offense, and giving as near as may be the time when and the place where the same was committed), you are commanded to receive him into your custody and detain him until he is legally discharged.

Dated this — day of —, eighteen —.

NOTE.—See note to Sec. 876.

878. (§ 170.) On holding the defendant to answer, the magistrate may take from each of the material witnesses examined before him on the part of the people a written undertaking, to the effect that he will appear and testify at the Court to which the depositions and statements are to be sent, or that he will forfeit the sum of five hundred dollars. Undertaking of witnesses to appear, when and how taken.

879. (§ 171.) When the magistrate or a Judge of the Court in which the action is pending is satisfied, by proof on oath, that there is reason to believe that any such witness will not appear and testify unless security is required, he may order the witness to enter into a written undertaking, with sureties, in such sum as he may deem proper, for his appearance as specified in the preceding section. Security for the appearance of witnesses, when and how required.

NOTE.—Stats. 1870, p. 787. But see Secs. 865, 869, and 882, and Subd. 1 of note to Sec. 869.

Infants and married women may be required to give security.

880. (§ 172.) Infants and married women, who are material witness against the defendant, may be required to procure sureties for their appearance, as provided in the last section.

Witnesses to be committed on refusal to give security for their appearance.

881. (§ 173.) If a witness, required to enter into an undertaking to appear and testify, either with or without sureties, refuses compliance with the order for that purpose, the magistrate must commit him to prison until he complies or is legally discharged.

Witness unable to give security may be conditionally examined.

882. (§§ 174, 175.) When, however, it satisfactorily appears, by examination on oath of the witness, or any other person, that the witness is unable to procure sureties, he may be forthwith conditionally examined on behalf of the people; such examination must be by question and answer, and conducted in the same manner as the examination before a committing magistrate is required by this Code to be conducted, and the witness thereupon be discharged; but this section does not apply to the prosecutor or to an accomplice in the commission of the offense charged.

Not applicable to prosecutor or accomplice.

NOTE.—See Sec. 869, and note, Subd: 1.

Magistrate to return depositions, etc., to the Court

883. (§ 176.) When a magistrate has discharged a defendant, or has held him to answer, he must return, without delay, to the Clerk of the Court at which the defendant is required to appear, the warrant, if any, the depositions, and all undertakings of bail, or for the appearance of witnesses taken by him.

TITLE IV.

OF PROCEEDINGS AFTER COMMITMENT AND BEFORE
INDICTMENT.CHAPTER I. *Preliminary provisions.*II. *Formation of the Grand Jury.*III. *Powers and duties of a Grand Jury.*IV. *Presentment and proceedings thereon.*

CHAPTER I.

PRELIMINARY PROVISIONS.

SECTION 888. What prosecutions must be by indictment.

889. What by accusation or information.

890. Indictments and accusations, in what Court found.

888. (§ 177.) All public offenses triable in the District and County Courts, must be prosecuted by indictment, except as provided in the next section.

What prosecutions must be by indictment.

NOTE.—Stats. 1853, p. 158.

889. (§ 178.) When the proceedings are had for the removal of district, county, municipal, or township officers, they may be commenced by an accusation or information, in writing, as provided in Sections 758 and 772.

What by accusation or information.

NOTE.—Stats. 1853, p. 40; 1851, p. 212.

890. (§ 179.) All accusations against district, county, municipal, and township officers, and all indictments, must be found in the County Court.

Indictments and accusations, in what Court found.

NOTE.—Stats. 1863, p. 158.

CHAPTER II.

FORMATION OF THE GRAND JURY.

SECTION 894. Who may challenge the panel or an individual juror.

895. Cause of challenge to a panel.

896. Cause of challenge to an individual grand juror.

897. Manner of taking and trying challenges.

898. Decision upon challenges.

899. Effect of allowing a challenge to a panel.

900. Effect of allowing challenge to an individual juror.

901. Objections can only be taken by challenge.

902. Appointment of a foreman.

903. Oath of foreman.

904. Oath of other grand jurors.

905. Charge of the Court.

906. Retirement of the Grand Jury. Discharge of.

907. Special Grand Jury.

908. Order for special Grand Jury.

909. Order, how executed.

910. Special Grand Jury, how formed.

Who may
challenge
the panel
or an
individual
juror.

894. (§ 181.) The people, or a person held to answer a charge for a public offense, may challenge the panel of a Grand Jury, or an individual juror.

Cause of
challenge
to a panel.

895. (§ 182.) A challenge to the panel may be interposed for one or more of the following causes only:

1. That the requisite number of ballots was not drawn from the jury box of the county;

2. That notice of the drawing of the Grand Jury was not given;

3. That the drawing was not had in the presence of the officers designated by law.

NOTE.—Challenges to the panel must, if the defendant has been held to answer before that time, be taken before the Grand Jury is made up and sworn.—People vs. Moice, 15 Cal., p. 329; People vs. Beatty, 14 Cal., p. 566; People vs. Romero, 18 Cal., p. 89; People vs. Arnold, 15 Cal., p. 476; People vs. Henderson, 28 Cal., p. 455; People vs. Roberts, 6 Cal., p. 214. But if the defendant had not been held to answer before the Grand Jury was impaneled, he may challenge the panel on

his arraignment.—People vs. Beatty, 14 Cal., p. 566. A defendant not held to answer before the finding of an indictment is entitled, on motion, to have the indictment set aside when it is shown that he had at the time the Grand Jury was impaneled a good ground of challenge to one or more of the Grand Jurors who found the indictment. Upon this motion it is the duty of the Court to afford the accused every facility, by granting process to secure the presence, for examination, of each of the jurors challenged, and other witnesses necessary.—People vs. Turner, 39 Cal., p. 377. If it is shown that certain persons who had been drawn as Grand Jurors were excused by the Court, it will be presumed, in the absence of a showing to the contrary, that the Court did not excuse such persons without a legal cause.—People vs. Millsaps, 35 Cal., p. 47.

896. A challenge to an individual Grand Juror may be interposed for one or more of the following causes only:

Cause of
challenge
to an
individual
grand juror

1. That he is a minor;
2. That he is an alien;
3. That he is insane;
4. That he is a prosecutor upon a charge against the defendant;

5. That he is a witness on the part of the prosecution, and has been served with process or bound by an undertaking as such;

6. That a state of mind exists on his part in reference to the case, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, or common notoriety, provided it satisfactorily appear to the Court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him.

CRIMINAL PROCEDURE ACT OF 1894, AS AMENDED, 1870, p. 786. It stands upon the same footing of reason and justice as, and covers cases that may not fall

within, Subdivision 6. If the defendant has been held to answer, the challenge must be taken before the Grand Jury is sworn.—*People vs. Moice*, 15 Cal., p. 329; *People vs. Hidden*, 32 Cal., p. 445; see note to Sec. 895.

Manner of
taking and
trying
challenges.

897. The challenges mentioned in the last three sections may be oral or in writing, and must be tried by the Court.

in the case of a grand jury, the Court.

Decision
upon
challenges.

898. (§ 185.) The Court must allow or disallow the challenge, and the Clerk must enter its decisions upon the minutes.

Effect of
allowing a
challenge
to a panel.

899. (§ 186.) If a challenge to the panel is allowed, the Grand Jury are prohibited from inquiring into the charge against the defendant, by whom the challenge was interposed. If, notwithstanding, they do so, and find an indictment against him, the Court must direct it to be set aside.

Effect of
allowing
challenge
to an
individual
juror.

900. (§§ 187, 188.) If a challenge to an individual Grand Juror is allowed, he cannot be present or take part in the consideration of the charge against the defendant who interposed the challenge, or the deliberations of the Grand Jury thereon. The Grand Jury must inform the Court of a violation of this section, and it is punishable by the Court as a contempt.

NOTE.—If there is more than one person in custody, awaiting the action of the Grand Jury, and the jury is disqualified from passing upon the case of one by reason of a sufficient portion of its members having formed an opinion of his guilt, it may nevertheless pass upon the cases of the others.—*People vs. Manahan*, 32 Cal., p. 68. An indictment for murder can be legally found by thirteen members of a Grand Jury composed of sixteen persons, three of the number having been challenged by the defendant and excused by the Court from the examination of the charge.—*People vs. Gatewood*, 20 Cal., p. 146; see, also, *People vs. Butler*, 8

Cal., p. 435. An indictment is not vitiated because one of the Grand Jurors, who has been challenged and excluded from the deliberations of the case, appears in Court with the other jurors when the indictment is presented.—People vs. Gatewood, 20 Cal., p. 146.

901. (§ 189.) A person held to answer to a charge for a public offense can take advantage of any objection to the panel or to an individual Grand Juror in no other mode than by challenge.

Objections
can only be
taken by
challenge.

902. (§ 190.) From the persons summoned to serve as Grand Jurors and appearing, the Court must appoint a foreman. The Court must also appoint a foreman when the person already appointed is excused or discharged before the Grand Jury is dismissed.

Appoint-
ment of a
foreman.

903. The following oath must be administered to the Foreman of the Grand Jury: "You, as Foreman of the Grand Jury, will diligently inquire into, and true presentment make, of all public offenses against the people of this State, committed or triable within this county, of which you shall have or can obtain legal evidence. You will keep your own counsel and that of your fellows and of the Government, and will not, except when required in the due course of judicial proceedings, disclose the testimony of any witness examined before you, nor anything which you or any other Grand Juror may have said, nor the manner in which you or any other Grand Juror may have voted on any matter before you. You will present no person through malice, hatred, or ill-will, nor leave any unrepresented through fear, favor, or affection, or for any reward, or the promise or hope thereof; but in all your presentments you will present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding, so help you God."

Oath of
foreman.

904. (§ 192.) The following oath must be immediately thereupon administered to the other Grand Jurors present: "The same oath which your foreman has now taken before you on his part, you and each of

Oath of
other grand
jurors.

you shall well and truly observe on your part, so help you God."

Charge of
the Court.

905. (§ 193.) The Grand Jury being impaneled and sworn, must be charged by the Court. In doing so, the Court must give them such information as it may deem proper, or as is required by law, as to their duties, and as to any charges for public offenses returned to the Court or likely to come before the Grand Jury.

Retirement
of the
Grand
Jury.
Discharge
of.

906. (§§ 194, 195.) The Grand Jury must then retire to a private room and inquire into the offenses cognizable by them. On the completion of the business before them, they must be discharged by the Court; but, whether the business is completed or not, they are discharged by the final adjournment of the Court.

Special
Grand
Jury.

907. (§ 196.) If an offense is committed during the sitting of the Court, after the discharge of the Grand Jury, the Court may, in its discretion, direct an order to be entered that the Sheriff summon another Grand Jury.

Order for
special
Grand
Jury.

908. (§ 197.) The order must require the Sheriff to summon sixteen persons, qualified to serve as Grand Jurors, to appear at a time specified, and a copy thereof, under the seal of the Court, must, by the Clerk, be delivered to the Sheriff.

Order, how
executed.

909. (§ 198.) The Sheriff must execute the order and return it, with a list of names of the persons summoned.

Special
Grand
Jury, how
formed.

910. (§ 199.) At the time appointed the list must be called over, and the names of those in attendance be written by the Clerk on separate ballots and put into a box, from which a Grand Jury must be drawn.

CHAPTER III.

POWERS AND DUTIES OF A GRAND JURY.

SECTION 915. Powers of Grand Jury.

- 916. Presentment defined.
- 917. Indictment defined.
- 918. Foreman may administer oaths.
- 919. Evidence receivable before the Grand Jury.
- 920. Grand Jury not bound to hear evidence for the defendant, but may order explanatory evidence, etc.
- 921. Degree of evidence to warrant indictment.
- 922. Grand Jurors must declare their knowledge as to commission of public offense.
- 923. Must inquire into cases of persons imprisoned, etc.
- 924. Entitled to access to public prison, etc.
- 925. When and from whom they may ask advice, and who may be present during their sessions.
- 926. Secrets of Grand Jury to be kept, except, etc.
- 927. Grand Juror not to be questioned for his conduct, except, etc.

915. (§ 205.) The Grand Jury must inquire into all public offenses committed or triable within the county, and present them to the Court, either by presentment or by indictment.

Powers of
Grand
Jury.

NOTE.—The Grand Jury may inquire into all offenses committed within the county not barred by the Statute of Limitations.—People vs. Beatty, 14 Cal., p. 566.

916. (§ 207.) A presentment is an informal statement in writing, by the Grand Jury, representing to the Court that a public offense has been committed which is triable in the county, and that there is reasonable ground for believing that a particular individual named or described therein has committed it.

Present-
ment
defined.

917. (§ 206.) An indictment is an accusation in writing, presented by the Grand Jury to a competent Court, charging a person with a public offense.

Indict-
ment
defined.

918. (§ 208.) The foreman may administer an oath to any witness appearing before the Grand Jury.

Foreman
may
administer
oaths.

Evidence
receivable
before the
Grand
Jury.

919. (§§ 209, 210.) In the investigation of a charge for the purpose of either presentment or indictment, the Grand Jury can receive no other evidence than such as is given by witnesses produced and sworn before them, or furnished by legal documentary evidence, or the deposition of a witness in the cases mentioned in the third subdivision of Section 686. The Grand Jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence.

NOTE.—Depositions taken before a magistrate upon the examination of the accused may be used before the Grand Jury.—*People vs. Steuart*, 4 Cal., p. 218. The defendant may testify before the Grand Jury.—*People vs. King*, 28 Cal., p. 265.

Grand Jury
not bound
to hear
evidence
for the
defendant,
but may
order ex-
planatory
evidence,
etc.

920. (§ 211.) The Grand Jury is not bound to hear evidence for the defendant; but it is their duty to weigh all the evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they should order such evidence to be produced, and for that purpose may require the District Attorney to issue process for the witnesses.

Degree of
evidence to
warrant
indictment.

921. (§ 212.) The Grand Jury ought to find an indictment when all the evidence before them, taken together, if unexplained or uncontradicted, would, in their judgment, warrant a conviction by a trial jury.

NOTE.—When all the evidence before the Grand Jury taken together is such as in the judgment of the jurors would, if unexplained or uncontradicted, warrant a conviction, an indictment ought to be found; but if such evidence would not warrant such conviction, an indictment ought not to be found.—*People vs. Linder*, 19 Cal., p. 539. The Grand Jury are not to determine the degree of murder.—*People vs. Nichol*, 34 Cal., p. 211.

Grand
Jurors
must
declare
their
knowledge
as to
commission
of public
offense.

922. (§ 213.) If a member of a Grand Jury knows, or has reason to believe, that a public offense, triable within the county, has been committed, he must de-

clare the same to his fellow jurors, who must thereupon investigate the same.

923. (§ 214.) The Grand Jury must inquire into the case of every person imprisoned in the jail of the county on a criminal charge and not indicted; into the condition and management of the public prisons within the county; and into the willful and corrupt misconduct in office of public officers of every description within the county.

Must inquire into cases of persons imprisoned, etc.

924. (§ 215.) They are also entitled to free access, at all reasonable times, to the public prisons, and to the examination, without charge, of all public records within the county.

Entitled to access to public prison, etc.

925. (§ 216.) The Grand Jury may, at all reasonable times, ask the advice of the Court, or the Judge thereof, or of the District Attorney; but unless such advice is asked the Judge of the Court must not be present during the sessions of the Grand Jury. The District Attorney of the county may at all times appear before the Grand Jury for the purpose of giving information or advice relative to any matter cognizable by them, and may interrogate witnesses before them whenever they or he thinks it necessary; but no other person is permitted to be present during the sessions of the Grand Jury except the members and witnesses actually under examination, and no person must be permitted to be present during the expression of their opinions or giving their votes upon any matter before them.

When and from whom they may ask advice, and who may be present during their sessions.

NOTE.—Stats. 1863, p. 158, Sec. 6.

Stats. 1871-2, p. 540.

An Act in relation to interpreters before Grand Juries.

[Approved March 23, 1872.]

[Enacting clause.]

SECTION 1. The Grand Jury or District Attorney may require, by subpoena, the attendance of any person

before the Grand Jury as interpreter; and the interpreter may be present at the examination of witnesses before the Grand Jury.

SEC. 2. This Act shall be in force from and after its passage.

Secrets of
Grand Jury
to be kept,
except, etc.

926. (§§ 217, 218.) Every member of the Grand Jury must keep secret whatever he himself or any other Grand Juror may have said, or in what manner he or any other Grand Juror may have voted on a matter before them; but may, however, be required by any Court to disclose the testimony of a witness examined before the Grand Jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the Court, or to disclose the testimony given before them by any person, upon a charge against such person for perjury in giving his testimony or upon trial therefor.

NOTE.—The obligation of secrecy is imposed on Grand Jurors for the benefit of the public, and not for the benefit of witnesses before them. It follows, therefore, that such witnesses cannot take advantage of this obligation in a criminal prosecution against them.—*People vs. Young*, 31 Cal., p. 563.

Grand
Juror
not to be
questioned
for his
conduct,
except, etc.

927. (§ 219.) A Grand Juror cannot be questioned for anything he may say or any vote he may give in the Grand Jury relative to a matter legally pending before the jury, except for a perjury of which he may have been guilty, in making an accusation or giving testimony to his fellow jurors.

CHAPTER IV.

PRESENTMENT AND PROCEEDINGS THEREON.

SECTION 931. Presentment must be by twelve Grand Jurors, etc.

932. Must be presented to the Court and filed.

933. If the facts stated in the presentment constitute a public offense, the Court must direct a bench warrant.

934. Bench warrant, by whom and how issued.

SECTION 935. Form of bench warrant.

936. Bench warrant, how served.

937. Proceedings of magistrate on defendant being brought before him.

931. (§ 220.) A presentment cannot be found without the concurrence of at least twelve Grand Jurors. When so found it must be signed by the foreman.

Presentment must be by twelve Grand Jurors, etc.

932. (§ 221.) The presentment, when found, must be presented by the foreman, in presence of the Grand Jury, to the Court, and must be filed with the Clerk.

Must be presented to the Court and filed.

933. (§ 224.) If the facts stated in the presentment constitute a public offense, triable in the county, the Court must direct the Clerk to issue a bench warrant for the arrest of the defendant.

If the facts stated in the presentment constitute a public offense, the Court must direct a bench warrant.

934. (§ 225.) The Clerk, on the application of the Judge or District Attorney, may accordingly, at any time after the order, whether the Court be sitting or not, issue a bench warrant, under his signature and the seal of the Court, into one or more counties.

Bench warrant, by whom and how issued.

935. (§ 226.) The bench warrant, upon presentment, must be substantially in the following form:

Form of bench warrant.

COUNTY OF ———.

The People of the State of California to any Sheriff, Constable, Marshal, or Policeman in this State:

A presentment having been made on the — day of —, eighteen —, to the County Court of the County of —, charging C. D. with the crime of — (designating it generally), you are therefore commanded forthwith to arrest the above named C. D. and take him before E. F., a magistrate of this county; or, in case of his absence or inability to act, before the nearest and most accessible magistrate in this county.

Given under my hand, with the seal of said Court affixed, this — day of —, A. D. eighteen —.

By order of the Court.

[SEAL,]

G. H., Clerk.

NOTE.—Stats. 1863, p. 159, Sec. 8.

Bench
warrant,
how served

936. (§ 227.) The bench warrant may be served in any county, and the officer serving it must proceed thereon as upon a warrant of arrest on an information, except that when served in another county, it need not be indorsed by a magistrate of that county.

Proceed-
ings of
magistrate
on defend-
ant being
brought
before him.

937. (§ 228.) The magistrate, when the defendant is brought before him, must proceed upon the charges contained in the presentment, in the same manner as upon a warrant of arrest on an information.

TITLE V.

OF THE INDICTMENT.

- CHAPTER I. *Finding and presentment of the indictment.*
II. *Rules of pleading and form of the indictment.*

CHAPTER I.

FINDING AND PRESENTMENT OF THE INDICTMENT.

SECTION 940. Indictment must be found by twelve jurors, indorsed, etc.

941. If not found depositions, etc., must be returned to Court, etc.

942. Effect of dismissal.

943. Names of witnesses inserted at foot of indictment.

944. Indictment, how presented and filed.

945. Proceedings when defendant is not in custody.

Indict-
ment must
be found
by twelve
jurors,
indorsed,
etc.

940. (§ 229.) An indictment cannot be found without the concurrence of at least twelve Grand Jurors. When so found it must be indorsed, "A true bill," and the indorsement must be signed by the foreman of the Grand Jury.

NOTE.—In *People vs. Roberts*, 6 Cal., p. 214, it was held that a Grand Jury must be composed of not less than seventeen, but that all need not be present at the finding of the indictment, provided twelve were present and concurring. The Code of Civil Procedure, Sec. 192, provides that the Grand Jury shall consist of not less than thirteen nor more than fifteen. An indictment found by a Grand Jury consisting of *more* than fifteen would be void.—*People vs. Thurston*, 5 Cal., p. 69.

941. (§ 230.) If twelve Grand Jurors do not concur in finding an indictment against a defendant who has been held to answer, the depositions and statement, if any, transmitted to them must be returned to the Court, with an indorsement thereon, signed by the foreman, to the effect that the charge is dismissed.

If not found depositions, etc., must be returned to Court, etc.

942. (§ 231.) The dismissal of the charge does not prevent its resubmission to a Grand Jury as often as the Court may direct. But without such direction it cannot be resubmitted.

Effect of dismissal.

943. (§ 232.) When an indictment is found, the names of the witnesses examined before the Grand Jury, or whose depositions may have been read before them, must be inserted at the foot of the indictment, or indorsed thereon, before it is presented to the Court.

Names of witnesses inserted at foot of indictment

NOTE.—If the names of the witnesses are not inserted at the foot of the indictment, or indorsed thereon, before it is presented to the Court, the defendant must take advantage of the omission at the time of arraignment by motion to set aside the indictment. If he does not do so the objection is waived.—*People vs. Lopez*, 26 Cal., p. 112; *People vs. Symonds*, 22 Cal., p. 348. A witness may be sworn and examined on the trial whose name is not indorsed on the indictment.—*People vs. Symonds*, 22 Cal., p. 348.

944. (§ 233.) An indictment, when found by the Grand Jury, must be presented by their foreman, in their presence, to the Court, and must be filed with the Clerk.

Indictment, how presented and filed.

NOTE.—It will be presumed that an indictment was presented to the Court by the foreman of the Grand Jury and in their presence, although that fact is not indorsed on it. The indorsement is not essential to the legal sufficiency of the indictment.—*People vs. Lawrence*, 21 Cal., p. 368; *People vs. Blackwell*, 27 Cal., p. 65.

Proceedings when defendant is not in custody.

945. (§ 234.) When an indictment is found against a defendant not in custody, the same proceedings must be had as are prescribed in Sections 979 to 984, inclusive, against a defendant who fails to appear for arraignment.

NOTE.—Stats. 1851, p. 212. A party indicted for a bailable offense, and who is under arrest on a bench warrant on which an order is indorsed admitting him to bail, is entitled to his discharge upon the execution of a recognizance in proper form, etc.—*People vs. Peniman*, 37 Cal., p. 271.

CHAPTER II.

RULES OF PLEADING AND FORM OF THE INDICTMENT.

SECTION 948. Form of and rules of pleading.

949. First pleading by the people is indictment.

950. Indictment, what to contain.

951. Form of indictment.

952. Indictment must be direct and certain.

953. When defendant is indicted by fictitious name, etc.

954. The indictment must charge but one offense and in one form, except where it may be committed by different means.

955. Statement as to time when offense was committed.

956. Statement as to person injured or intended to be.

957. Construction of words used in an indictment.

958. Words used in a statute need not be strictly pursued.

959. Indictment, when sufficient.

960. Indictment not insufficient for defect of form not tending to prejudice defendant.

961. Presumptions of law, etc., need not be stated.

962. Judgments, etc., how pleaded.

963. Private statutes, how pleaded.

964. Pleading in indictment for libel.

SECTION 965. Pleading in indictment for forgery, where instrument has been destroyed or withheld by defendant.

966. Pleading in an indictment for perjury or subornation of perjury.

967. Pleading in indictment for larceny or embezzlement.

968. Pleading in an indictment for selling, exhibiting, etc., lewd and obscene books, etc.

969. Previous conviction of another offense, how stated in indictment.

970. Indictment against several, one or more may be acquitted.

971. Distinction between accessory before the fact and principal abrogated. Principals, how indicted, etc.

972. Accessory may be indicted and tried, though principal has not been.

948. (§ 235.) All the forms of pleading in criminal actions, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by this Code.

Form of
and rules
of pleading

NOTE.—The criminal Code of this State has worked the same change in pleading in criminal actions which has been wrought by the Practice Act in civil cases.—People vs. King, 27 Cal., p. 507. The bench and bar must search the provisions of the Code for the form of an indictment and for the rules by which its sufficiency is to be determined rather than in the common law.—People vs. Cronin, 34 Cal., p. 191; People vs. Dick, 37 Cal., p. 277; People vs. Ah Woo, 28 Cal., p. 205; People vs. Murphy, 40 Cal., p. 52.

949. (§ 236.) The first pleading on the part of the people is the indictment.

First pleading by the people is indictment.

950. (§ 237.) The indictment must contain:

1. The title of the action, specifying the name of the Court to which the indictment is presented, and the names of the parties.

Indictment, what to contain.

2. A statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended.

NOTE.—**ENTITLING.**—An indictment in the Courts of San Francisco may be entitled either as of the County of San Francisco, or as of the City and County

950. In an indictment for receiving stolen property, the allegation of the name of the person who stole the goods, or that his name is unknown to the Grand Jury, is unnecessary and immaterial. People v. Avila, 43 Cal. 197.

of San Francisco.—*People vs. Beatty*, 14 Cal., p. 566; *People vs. O'Conner*, 17 Cal., p. 354.

NAME OF THE DEFENDANT.—Indictment against James B. Boggs, and verdict against J. M. Boggs. *Held*, that the error in the initial of the middle name of the defendant in the verdict was immaterial.—*People vs. Boggs*, 20 Cal., p. 432; *People vs. Lockwood*, 6 Cal., p. 205. See Sec. 959 and note.

Form of
indictment.

951. (§ 238.) It may be substantially in the following form:

The People of the State of California against A. B., in the County Court of the County of —, at its — Term, A. D. eighteen —:

A. B. is accused by the Grand Jury of the County of —, by this indictment, of the crime of (giving its legal appellation, such as murder, arson, or the like, or designating it as felony or misdemeanor), committed as follows: The said A. B., on the — day of —, A. D. eighteen —, at the County of — (here set forth the act or omission charged as an offense).

NOTE.—Stats. 1863, p. 159, Sec. 9. As to form of indictment for murder, see *People vs. Cronin*, 34 Cal., p. 191.

Indict-
ment must
be direct
and certain

952. (§ 239.) It must be direct and certain, as it regards:

1. The party charged;
2. The offense charged;
3. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense.

NOTE.—The indictment must be direct and certain as to the party charged, the offense charged, and the particular circumstances.—*People vs. Saviers*, 14 Cal., p. 29. See, also, notes to Secs. 950 and 959.

When
defendant
is indicted
by fictitious
name, etc.

953. (§ 240.) When a defendant is indicted by a fictitious or erroneous name, and in any stage of the proceedings his true name is discovered, it must be inserted in the subsequent proceedings, referring to the fact of his being indicted by the name mentioned in the indictment.

NOTE.—This section held constitutional in *People vs. Kelly*, 6 Cal., p. 210. If the defendant is indicted by a wrong name, and so states when asked, and gives his true name, the true name must be substituted and all after proceedings be had in that name.—*People vs. Jim T.*, 32 Cal., p. 60.

954. The indictment must charge but one offense, but the same offense may be set forth in different forms under different counts, and, when the offense may be committed by the use of different means, the means may be alleged in the alternative in the same count.

The indictment must charge but one offense and in one form, except where it may be committed by different means.

NOTE.—If an indictment contains more than one count it should appear clearly on its face that the matters set forth in the different counts are descriptive of the same transaction or offense.—*People vs. Thompson*, 28 Cal., p. 214. An indictment which charges burglary mixed with larceny, charges two offenses.—*People vs. Garnett*, 29 Cal., p. 622. An indictment against a Tax Collector which states that he received a certain sum for licenses due the State, and a certain other sum for licenses due the county, and then charges him with embezzling the sum total, does not charge two offenses.—*People vs. De la Guerra*, 28 Cal., p. 507. An indictment which charges the defendant with having forged an indorsement on a draft, and also with having uttered and passed the draft, knowing the forged indorsement to have been written thereon, does not charge two offenses.—*People vs. Frank*, 28 Cal., p. 507. If an indictment for forgery contains two counts, each containing a copy of the instrument alleged to have been forged, it will not in the absence of an averment to that effect be presumed that each is a copy of only one and the same instrument.—*People vs. Shotwell*, 27 Cal., p. 394. In an indictment A. was charged with the larceny of certain goods, and B. with having feloniously received them, knowing them to have been stolen. *Held*, that two offenses were charged, and against different parties.—*People vs. Hawkins*, 34 Cal., p. 181. An indictment for larceny which in one count charges the goods stolen to be the property of A. and B., and in another to be the property of C., and in another to be the property of D., is good. It does not charge different offenses, but the same offense in different forms.—*People vs. Conner*, 17 Cal., p. 354. An indictment which charges that the defendant "feloniously, willfully, and for his own gain did *buy and receive*" a stolen mule, does not charge two offenses; the word "receive" does not make

PENAL CODE.

An indictment against two persons for murder may charge in one count one as principal and the other as accessory, and in another count the latter as principal and the former as accessory. *People v. Valencia*, 43 Cal. 552. Such indictment does not charge each defendant with two offenses, nor are the two counts repugnant. *Id.* Sufficiency of indictment for possessing unfinished forged bank bills, containing two descriptions of same offense. *People v. Ah Sam*, 41 Cal. 645. Burglary and housebreaking are two distinct offenses, and cannot be made to constitute one offense by means of an averment in the indictment to that effect. *People v. Taggart*, 43 Cal. 81.

the offense less than, or different, from buying the stolen property.—*People vs. Montejo*, 18 Cal., p. 38. An indictment charging a Tax Collector with having in his possession, with intent to circulate, and with actually putting in circulation and issuing licenses other than those authorized by law, does not charge two offenses.—*People vs. De la Guerra*, 31 Cal., p. 459. An indictment which charges an assault and battery only as part of, or the mode of executing a forcible arrest and abduction, does not charge two separate offenses.—*People vs. Ah Own*, 39 Cal., p. 604. An indictment for rape, charging the offense and assault to commit it, does not charge two offenses.—*People vs. Tyler*, 35 Cal., p. 553; see, also, *People vs. Valencia*, April Term, 1872. If the indictment charges two offenses the objection is waived, unless it is taken by demurrer.—*People vs. Garnett*, 29 Cal., p. 622; *People vs. Conner*, 17 Cal., p. 354; *People vs. Burgess*, 35 Cal., p. 115.

as to time
when
offense was
commit-
ted.

955. (§ 242.) The precise time at which the offense was committed need not be stated in the indictment; but it may be alleged to have been committed at any time before the finding thereof, except where the time is a material ingredient in the offense.

NOTE.—See note to Sec. 959 of this Code.

956. Statement
as to person
injured or
intended
alleged to be
copying it
Cal. 494.

956. (§ 243.) When an offense involves the commission of, or an attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material.

NOTE.—Where on the trial for an assault with intent to inflict bodily injury the proof shows a misnomer as to the party injured, the variance is not immaterial, unless there be in the case other circumstances sufficient to identify the offense.—*People vs. McNealy*, 17 Cal., p. 332.

Construc-
tion of
words used
in an
indictment.

957. (§ 244.) The words used in an indictment are construed in their usual acceptance in common language, except such words and phrases as are defined by law, which are construed according to their legal meaning.

NOTE.—*People vs. Littlefield*, 5 Cal., p. 355.

958. (§ 245.) Words used in a statute to define a public offense need not be strictly pursued in the indictment; but other words conveying the same meaning may be used.

Words used
in a statute
need not be
strictly
pursued.

NOTE.—In charging an offense it is not necessary to follow strictly the language of the statute; words conveying the same meaning may be used.—People vs. Potter, 35 Cal., p. 110.

959. (§ 246.) The indictment is sufficient if it can be understood therefrom:

Indict-
ment, when
sufficient.

1. That it is entitled in a Court having authority to receive it, though the name of the Court be not stated;

2. That it was found by a Grand Jury of the county in which the Court was held;

3. That the defendant is named, or, if his name cannot be discovered, that he is described by a fictitious name, with a statement that his true name is to the jury unknown;

4. That the offense was committed at some place within the jurisdiction of the Court, except where the act, though done without the local jurisdiction of the county, is triable therein;

5. That the offense was committed at some time prior to the time of finding the indictment;

6. That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended;

7. That the act or omission charged as the offense is stated with such a degree of certainty as to enable the Court to pronounce judgment upon a conviction, according to the right of the case.

Note.—*Subd. 1.*—See Sec. 950, and note.

Subd. 2.—The term of the Court is well stated in the indictment, when the day on which the indictment was found is given.—People vs. Beatty, 14 Cal., p. 566.

Subd. 3.—See Sec. 950, and note.

Subd. 4.—Charging the commission of an offense at a certain city and county which are within the jurisdiction of the Court, is sufficient.—*People vs. Lafuente*, 6 Cal., p. 202. An indictment for murder which charges the offense to have been committed in the City and County of San Francisco is sufficient to give the Fourth District Court jurisdiction.—*People vs. Robinson*, 17 Cal., p. 363. When property has been stolen in one county and carried into another, the jurisdiction of the offense is in either county.—*People vs. Robles*, 29 Cal., p. 421; *People vs. Garcia*, 25 Cal., p. 531. If the offense charged consists of one transaction occurring partly in one county and partly in another, the indictment must state the facts.—*People vs. Ah Own*, 39 Cal., p. 604. The jurisdiction over offenses committed between the time of the passage of an Act creating and the organization of a new county is in the old county.—*People vs. McGuire*, 32 Cal., p. 140. An accessory must be indicted and tried in the county where the offense of the accessory was committed.—*People vs. Hodges*, 27 Cal., p. 340; see, also, *People vs. Stakem*, 40 Cal., p. 599.

Subd. 5.—If the offense is charged to have been committed on a particular day, which day was anterior to the finding of the indictment, there is no necessity for the averment that the offense was committed before the finding of the indictment.—*People vs. Lafuente*, 6 Cal., p. 202; *People vs. Littlefield*, 5 Cal., p. 355.

Subds. 6 and 7.—STATEMENT OF THE ACT OR OMISION GENERALLY.—The substantial facts necessary to constitute the crime must appear in the indictment with such certainty as will enable a man of ordinary intelligence to understand what is intended, and to enable the Court to pronounce a proper judgment; but the facts need not be stated with the particularity required at common law.—*People vs. Dolan*, 9 Cal., p. 576; *People vs. Rodriguez*, 10 Cal., p. 50; *People vs. White*, 34 Cal., p. 183; *People vs. Thompson*, 4 Cal., p. 238; *People vs. Murphy*, 40 Cal., p. 52; *People vs. Williams*, 35 Cal., p. 671. It is sufficient if the indictment charges the offense in the language of the statute. *People vs. Dolan*, 9 Cal., p. 576; *People vs. Martin*, 32 Cal., p. 91; *People vs. Cronin*, 34 Cal., p. 191; *People vs. Savins*, 14 Cal., p. 29; *People vs. Phipps*, 39 Cal., p. 326; see, also, Sec. 958 of this Code. If language used in the charging part of an indictment is capable of two interpretations without doing violence to its terms, only one of which imports a charge of larceny,

the indictment is not good.—People vs. Williams, 35 Cal., p. 671. It is not necessary that the indictment should state in terms that the offense charged is a felony or misdemeanor. The legal appellation of the crime, as given in the statute defining the offense, must be stated.—People vs. War, 20 Cal., p. 117. Where the indictment fully sets forth the offense the word “feloniously” need not be used.—People vs. Olivera, 7 Cal., p. 403. If a statute, in defining an offense, enumerates a series of acts, either of which separately, or all together, may constitute the offense, all such acts may be charged in a single count in the indictment.—People vs. Frank, 28 Cal., p. 507. If the statute enumerates several acts disjunctively which, separately or together, constitute an offense, the indictment, if it charges more than one of them, which it may do, and in the same count, must do so in the conjunctive. This rule has, however, no application where the words used disjunctively are synonymous.—People vs. Tomlinson, 35 Cal., p. 503. When the concurrence of several acts, or the doing of an act under particular circumstances, is necessary to constitute the offense, the indictment must state the acts or circumstances.—People vs. Murphy, 40 Cal., p. 52. An allegation charging the defendant as “Superintendent of Common Schools” is a sufficient description of the office, under the Act of April 6, 1863.—People vs. Doss, 39 Cal., p. 428; see, also, People vs. Potter, 35 Cal., p. 110. An indictment under the eighty-ninth section of the Crimes and Punishment Act (Sec. 783 of this Code) for an offense committed on a vessel on her voyage in the inland waters of this State, must set forth all the facts, giving the extra territorial jurisdiction under the section.—People vs. Dougherty, 7 Cal., p. 395. An allegation in an indictment descriptive of the identity of what is legally essential to the defense, cannot be rejected as surplusage.—People vs. Myers, 20 Cal., p. 76. A bare negative qualification need not be averred, but must be relied on as matter of defense on the trial.—People vs. Nugent, 4 Cal., p. 341. The allegation of a day within the period of limitation is material whenever the offense is subject to limitation.—People vs. Miller, 12 Cal., p. 291. Matter avoiding the Statute of Limitations must be set out in the indictment whenever it would otherwise appear that the offense is barred.—People vs. Montejo, 18 Cal., p. 38.

CORPORATE NAME, HOW AVERRED.—People vs. Schwartz, 32 Cal., p. 160; People vs. Potter, 35 Cal., p. 110.

COMPANY OR PARTNERSHIP NAME, HOW AVERRED. See this note under the head "Larceny;" *People vs. Schwartz*, 32 Cal., p. 160.

STATEMENT OF THE ACT OR OMISSION IN PARTICULAR CASES.—ALTERING BRANDS.—An indictment for which charges the property as that of an *estate*, is not good; it should charge that the animal belongs to a particular individual, or that the owner is unknown.

ARSON.—See notes to Secs. 447, 451, 452, 454, of this Code. An averment that the defendant "feloniously, willfully, and maliciously did burn and cause to be burned," is sufficient without the statement in this respect that the defendant "set fire."—*People vs. Myers*, 20 Cal., p. 76. The averment must be direct as to the ownership of the property burned; therefore an indictment which contains two averments as to the ownership of a dwelling house, either of which without the other is good, but which are repugnant to each other, is demurable.—*People vs. Myers*, 20 Cal., p. 76. An indictment charging that the defendant "did on a certain day burn or caused to be burned a certain dwelling house," is bad.—*People vs. Hood*, 6 Cal., p. 236.

ASSAULT WITH A DEADLY WEAPON.—The weapon or instrument is the *gist* of the offense, and must be alleged and found.—*People vs. Vanard*, 6 Cal., p. 562. An indictment accusing the defendant of "an assault with a deadly weapon with intent to inflict upon the person of another a bodily injury, there appearing no considerable provocation therefor," sufficiently designates the offense.—*People vs. War*, 20 Cal., p. 117. The indictment should allege that the weapon was deadly, or state such facts as necessarily show that it was deadly.—*People vs. Jacobs*, 29 Cal., p. 579. An indictment charging the offense in the following language is insufficient: "In and upon one A. B. feloniously did make an assault with a deadly weapon, to wit: a pistol, loaded with powder and ball, with intent then and there to kill A. B. without any just cause or provocation, but with an abandoned and malignant heart." It is not direct and certain as to the offense charged, and it would be difficult to determine from it whether it intends to charge an assault with intent to commit murder or an assault with a deadly weapon.—*People vs. Urias*, 12 Cal., p. 326.

ASSAULT WITH INTENT TO COMMIT MURDER.—An indictment is sufficient if it charges that the defendant feloniously assaulted A., with a pistol loaded with

powder and ball, with intent, of malice aforethought, to kill and murder A.—People vs. English, 30 Cal., p. 214.

BURGLARY.—See notes to Secs. 459, 460, 461, and 463 of this Code, and People vs. Long, April Term, 1872. Burglary, under our statute, can only be committed with intent to commit a *felony*; therefore, an indictment charging an intent to steal certain goods, must specify the value of the goods intended to be stolen.—People vs. Murray, 8 Cal., p. 519. An indictment for breaking and entering a house in the night-time, with intent to commit a larceny, is good, without charging whose goods the defendant intended to steal, or that there were any goods in the house which the defendant could steal.—People vs. Shaber, 32 Cal., p. 36. An indictment for “entering a room or apartment with the intention to commit larceny,” rightly charges the ownership of the room to be in him who rented it from one who had the supervision and control of the whole house.—People vs. St. Clair, 38 Cal., p. 137. The hour of the night need not be charged in the indictment, and if charged, need not be proved as charged.—People vs. Burgess, 35 Cal., p. 115.

COUNTERFEITING.—In an indictment for having in possession counterfeit coin, with intent to utter it, the knowledge of the defendant of the spurious character of the coin is sufficiently charged in the words, the defendants “willfully, feloniously, and knowingly did have in their possession,” etc.—People vs. Stanton, 39 Cal., p. 698.

FORGERY.—See Secs. 470 and 965 of this Code. An indictment for forging an instrument in a foreign language need not contain a copy of the original in the foreign language—a translation is sufficient.—People vs. Ah Woo, 28 Cal., p. 205. If the instrument is set out in full, a misnomer of its technical designation is immaterial.—Id. If the intent to defraud by a forgery is described in the statute by different terms stated disjunctively, the indictment may state these terms conjunctively.—Id. It must appear from the indictment that the forged instrument is one which, if genuine, would injure another. This fact may appear from a recital or description of the instrument, but if it does not, it must be made to appear by the averment of matter *aliunde* which will show it to be of that character.—People vs. Tomlinson, 35 Cal., p. 503.

LARCENY.—See Secs. 484 and 967 of this Code. An indictment charging the defendant with feloniously taking three head of cattle, without showing the par-

particular species of cattle taken, is sufficient.—*People vs. Littlefield*, 5 Cal., p. 355. An indictment describing the property stolen as fifteen twenty-dollar gold pieces need not aver the value of each particular piece of coin.—*People vs. Green*, 15 Cal., p. 512; see, also, *People vs. Cohen*, 8 Cal., p. 42; and *People vs. Poggi*, 19 Cal., p. 600. An indictment describing the property as “a black or brown mare or filly, branded with a small mule shoe on the left shoulder,” is sufficiently particular in description. Stating the color in the alternative is not a fatal objection, when other terms are given which identify the property.—*People vs. Smith*, 15 Cal., p. 408. In *People vs. Bull*, 14 Cal., p. 101, it was held that an indictment for larceny, describing the money as “three thousand dollars, lawful money of the United States,” was insufficient, and that the particular denomination or species of coin must be set forth. The rule laid down in this case is abrogated by Sec. 967 of this Code. In *The People vs. Bogart*, 36 Cal., p. 245, it is said that if the species of coin is unknown to the Grand Jury they may so state in lieu of specifying it. An indictment for larceny which states that A. B. & Co. are the owners of the property is sufficient.—*People vs. Ah Sing*, 19 Cal., p. 598; but see *People vs. Bogart*, 36 Cal., p. 247. An indictment charging the accused with the larceny of two hundred and fifty sheep, of the value of one thousand dollars, is not insufficient, because the value of each sheep is not separately stated.—*People vs. Robles*, 34 Cal., p. 591. The allegation of value in “dollars,” without adding “lawful money of the United States,” is sufficient.—*People vs. Winkler*, 9 Cal., p. 234. Under the statute of March 28, 1868, it is not necessary in an indictment for stealing a horse, mare, etc., to state the value thereof.—*People vs. Townsley*, 39 Cal., p. 405. The principle of the statute referred to in *People vs. Townsley* is embodied in Subdivision 3 of Sec. 487 of this Code. An indictment for entering a house with intent to steal need not aver the value of, nor give more than a general description of, the property the defendant intended to steal.—*People vs. Ah Yee*, 31 Cal., p. 451. An indictment charging that the defendant “did feloniously, willfully, and unlawfully steal, take, and carry, lead, and drive away,” contains a sufficient statement of the intent.—*People vs. Brown*, 27 Cal., p. 500. An indictment which charges the defendant with “stealing, taking, leading, or driving away,” is not defective as charging the offense in the disjunctive. *People vs. Smith*, 15 Cal., p. 408; see note to Sec. 958.

The venue may be laid in any county into which the stolen property is conveyed. It is not necessary to state facts showing the commission of the larceny in another county.—*People vs. Mellon*, 40 Cal., p. 648.

LARCENY BY BAILEES.—Under an indictment charging larceny in the usual form, the proof was that the defendant hired a horse, promising to return it by evening, but never did so. It was held that the defendant could not be convicted without proving that he intended to steal the horse at the time he took it; that the indictment was not good for the statutory offense of converting property of which the defendant was bailee.—*People vs. Jersey*, 18 Cal., p. 337. Indictments against bailees should distinctly set forth the character of the bailment, the mode of conversion, the description of the property, and its value.—*People vs. Cohen*, 8 Cal., p. 42; *People vs. Patterson*, 9 Cal., p. 313; *People vs. Poggi*, 19 Cal., p. 600.

MURDER.—An indictment for murder should not state the degree; if it does, it does not vitiate it, but the statement may be treated as surplusage.—*People vs. King*, 27 Cal., p. 507; *People vs. Lloyd*, 9 Cal., p. 54; *People vs. Dolan*, 9 Cal., p. 576; *People vs. Vance*, 21 Cal., p. 400. It is sufficient to describe the deceased by the name he was commonly known.—*People vs. Freeland*, 6 Cal., p. 96. The time when the crime was committed need not be stated if the indictment shows that it was before the finding of the indictment, and within one year and a day before death ensued from the wound.—*People vs. Kelly*, 6 Cal., p. 210; *People vs. Aro*, 6 Cal., p. 207. A description of the weapon used, the length and depth of the wounds, and the part of the body on which they were inflicted, is not necessary.—*People vs. Stevenson*, 9 Cal., p. 273; *People vs. Cronin*, 34 Cal., p. 191; *People vs. King*, 27 Cal., p. 507; *People vs. Judd*, 10 Cal., p. 313; *People vs. Chosier*, 10 Cal., p. 310. The crime of murder consists in the killing of a human being unlawfully with malice aforethought. The manner and means of its accomplishment need not be stated.—*People vs. Cronin*, 34 Cal., p. 191; *People vs. Murphy*, 40 Cal., p. 52. An indictment containing a statement of the venue with the formal commencement prescribed by statute which avers "that A., on the 29th of July, 1866, at the County of Marin, within said State, feloniously, willfully, and of his malice aforethought, did kill and murder B.," etc., contains all the ultimate or issuable facts that need be stated under our system.—*People vs. Cronin*, 34 Cal., p. 191; see, also, *People vs. Nichol*,

959. ARSON.—An indictment for arson, which charges that the defendant, at a time named, was in the county where it is found, and then and there feloniously burned a building, sufficiently shows that the offense was committed at a place within the jurisdiction of the Court. People v. Wooley, 44 Cal. 494.

ASSAULT WITH DEADLY WEAPON.—An indictment for an assault with a deadly weapon, with intent to do bodily injury to another, may in general terms aver the assault to have been made "with a deadly weapon." People v. Congleton, 44 Cal. 93. The weapon by name, does not in such case, become a necessary ingredient of the crime, but the nature of the weapon, as being deadly or otherwise, is alone important; and it is essential to aver it in some appropriate way, to have been deadly in its character. Id.

In an indictment for burglary, an allegation that the defendant feloniously and unlawfully broke and entered the dwelling of another, burglariously, and with intent to commit a felony, is sufficient. People v. ...

34 Cal., p. 211. The allegation of premeditation or malice aforethought is necessary.—People vs. Urias, 12 Cal., p. 325. It is not, however, essential that the words "with malice aforethought" be used, provided terms of equivalent import are used. The words "willfully, maliciously, feloniously, and premeditatedly" are equivalent.—People vs. Vance, 21 Cal., p. 400; People vs. Ybarra, 17 Cal., p. 166. The absence of the word "deliberate" where the crime is alleged to have been committed "with malice aforethought" is immaterial.—People vs. Dolano, 9 Cal., p. 576; People vs. Murray, 10 Cal., p. 309. The allegation of "express malice" is not necessary in an indictment, and if made need not be proved in order to justify a verdict of murder in the first degree. The proper allegation is of "malice aforethought."—People vs. Bonilla, 38 Cal.,

r.—See Sec. 966 of this Code. An indictment charging the offense in the words of the statute, sufficient in People vs. Parsons, 6 Cal., p. 487.

-An indictment, charging that the defendant unlawfully and feloniously have carnal knowledge of a certain female child named A., she, the said ; under ten years of age, to wit, of the age of rs and upwards," is valid.—People vs. Mills, p. 276. It is not necessary to aver the age of n charged with committing the rape.—People vs. Beck, 29 Cal., p. 575.

VIOLATING STOLEN GOODS.—People vs. Hawkins, p. 181.

TRY.—An indictment is not invalid because it that the property was forcibly and violently from one person and against his will, and that person was the owner of it, though it fails to at it was taken without the consent or against ill of the owner, and also fails to aver the character of the possession of the person from whom it was —People vs. Shuler, 28 Cal., p. 490. An indictment which merely states that the property was taken "another person," is fatally defective; it must that it was taken from "the person of another." People vs. Beck, 21 Cal., p. 385. An indictment must be that the property taken was the property of the person other than the defendant.—People vs. Vice, 21 Cal., p. 344.

Indictment not insufficient for defect of form not tending to prejudice defendant.

960. (§ 247.) No indictment is insufficient, nor can the trial, judgment, or other proceeding thereon

be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits.

NOTE.—People vs. Dick, 37 Cal., p. 277.

961. (§ 248.) Neither presumptions of law nor matters of which judicial notice is taken, need be stated in an indictment. Presump-
tions of
law, etc.,
need not be
stated.

962. (§ 249.) In pleading a judgment or other determination of, or proceeding before, a Court or officer of special jurisdiction, it is not necessary to state the facts constituting jurisdiction; but the judgment or determination may be stated as given or made, or the proceedings had. The facts constituting jurisdiction, however, must be established on the trial. Judg-
ments, etc.,
how
pleaded.

963. (§ 250.) In pleading a private statute, or a right derived therefrom, it is sufficient to refer to the statute by its title and the day of its passage, and the Court must thereupon take judicial notice thereof. Private
statutes,
how
pleaded.

964. (§ 251.) An indictment for libel need not set forth any extrinsic facts for the purpose of showing the application to the party libeled of the defamatory matter on which the indictment is founded; but it is sufficient to state generally that the same was published concerning him, and the fact that it was so published must be established on the trial. Pleading in
indictment
for libel.

965. (§ 252.) When an instrument which is the subject of an indictment for forgery has been destroyed or withheld by the act or the procurement of the defendant, and the fact of such destruction or withholding is alleged in the indictment and established on the trial, the misdescription of the instrument is immaterial. Pleading in
indictment
for forgery,
where in-
strument
has been
destroyed
or withheld
by
defendant.

966. (§ 253.) In an indictment for perjury, or subornation of perjury, it is sufficient to set forth the

Pleading in
an indict-
ment for
perjury or
suborna-
tion of
perjury.

substance of the controversy or matter in respect to which the offense was committed, and in what Court and before whom the oath alleged to be false was taken, and that the Court, or the person before whom it was taken, had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment need not set forth the pleadings, record, or proceedings with which the oath is connected, nor the commission or authority of the Court or person before whom the perjury was committed.

967. In an indictment for the larceny or embezzlement of money, banknotes, certificates of stock, or valuable securities, or for a conspiracy to cheat and defraud a person of any such property, it is sufficient to allege the larceny or embezzlement, or the conspiracy to cheat and defraud, to be of money, banknotes, certificates of stock, or valuable securities, without specifying the coin, number, denomination, or kind thereof.

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NOTE.—Founded upon Stats. 7 and 8 Geo. IV, Chap. 29, Sec. 48. Speaking of the rule as it now exists, Justice Wallace, in *People vs. Cox*, October Term, 1870, says: "An indictment for the crime of embezzlement ought to state the description of the property embezzled, with the same particularity as is required in an indictment for larceny. For obvious reasons, it may be difficult to give such a description of property embezzled, particularly where the offense is committed by a person in the course of a continuous employment, as clerk, cashier, or the like; but I find nothing in the law authorizing us to make any distinction upon this point between the offenses of larceny and embezzlement. It would, perhaps, promote the ends of justice if a statute should be passed to correct the law in this particular." The same reasons apply to an indictment for larceny. See, also, note to Sec. 959.

Pleading in
an indict-
ment for
selling,
exhibiting,
etc., lewd
and
obscene
books, etc.

968. An indictment for exhibiting, publishing, passing, selling, or offering to sell, or having in possession, with such intent, any lewd or obscene book, pamphlet, picture, print, card, paper, or writing, need not set forth any portion of the language used or figures shown upon such book, pamphlet, picture,

print, card, paper, or writing; but it is sufficient to state generally the fact of the lewdness or obscenity thereof.

969. In charging in an indictment the fact of a previous conviction of a felony or of an attempt to commit an offense which, if perpetrated, would have been a felony, or of petit larceny, it is sufficient to state: "That the defendant, before the commission of the offense charged in this indictment, was in [giving the title of the Court in which the conviction was had] convicted of a felony [or attempt, etc. or of petit larceny]." If more than one previous conviction be charged in the indictment, the date of the judgment upon each conviction shall be stated, and not more than two previous convictions shall be charged in any one indictment.

Previous conviction of another offense, how stated in indictment.

970. (§ 254.) Upon an indictment against several defendants, any one or more may be convicted or acquitted.

Indictment against several, one or more may be acquitted.

971. The distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated, and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be indicted, tried, and punished as principals, and no additional facts need be alleged in any indictment against such an accessory as are required in an indictment against his principal.

Distinction between accessory before the fact and principal abrogated.

Principals, how indicted, etc.

same indictment.—People vs. Davidson, 5 Cal., p. 133; People vs. Valencia, April Term, 1872. An indictment, charging a felony and setting forth that the defendant was an accessory before the fact, is good under our statute.—People vs. Cryder, 6 Cal., p. 23. The acts of the defendant should be set forth in the indictment.—People vs. Schwartz, 32 Cal., p. 160.

972. An accessory to the commission of a felony may be indicted, tried and punished, though the principal may be neither indicted nor tried, and though the principal may have been acquitted.

Accessory may be indicted and tried, though principal has not been.

NOTE.—People vs. Newberry, 20 Cal. p. 439. The accessory must be indicted, tried, and punished as a

principal, but the particular acts, which established that he aided and abetted the crime, and thus became a principal, must be alleged in the indictment.—*People vs. Campbell*, 40 Cal., p. 129; see, also, *People vs. Trim*, 39 Cal., p. 75.

TITLE VI.

OF PLEADINGS AND PROCEEDINGS AFTER INDICTMENT AND BEFORE THE COMMENCEMENT OF THE TRIAL.

CHAPTER I. *Of the arraignment of the defendant.*

II. *Setting aside the indictment.*

III. *Demurrer.*

IV. *Plea.*

V. *Transmission of certain indictments from the County Court to the District Court or Municipal Criminal Court of San Francisco.*

VI. *Removal of the action before trial.*

VII. *The mode of trial.*

VIII. *Formation of the trial jury and the calendar of issues for trial.*

IX. *Postponement of the trial.*

CHAPTER I.

OF THE ARRAIGNMENT OF THE DEFENDANT.

SECTION 976. Defendant must be arraigned in the Court where the indictment was found or sent.

977. Defendant, when to be present at arraignment.

978. If in custody, to be brought before Court.

979. If discharged on bail, bench warrant to issue.

980. Bench warrant, by whom and how issued.

981. Form of bench warrant.

982. Directions in the bench warrant, if the offense is bailable.. Order for bail to be indorsed.

SECTION 983. Bench warrant, how served.

- 984. Proceeding on giving bail in another county.
- 985. Ordering defendant into custody or increasing bail when indictment is for felony.
- 986. Defendant, if present when order made, to be committed; if not, bench warrant to issue.
- 987. Defendant, on arraignment, to be informed of his right to counsel. When Court to assign counsel.
- 988. Arraignment, how made.
- 989. Proceedings on arraignment, when defendant is not indicted by his true name.
- 990. Time allowed, and how defendant may answer on arraignment.

976. (§ 258.) When the indictment is filed, the defendant must be arraigned thereon before the Court in which it is found, if triable therein; if not, before the Court to which it is transmitted.

Defendant must be arraigned in the Court where the indictment was found or sent.

NOTE.—See arraignment.—Sec. 988, and note, post. It was held in the case of *The People vs. Corbett*, 28 Cal., p. 328, that “a verdict in a criminal case, where there has been neither arraignment nor plea, is a nullity, and no valid judgment can be rendered thereon.”—*Douglas vs. State*, 3 Wisconsin, p. 830; 1 Whar., Sec. 530. “And so is a verdict rendered upon a plea put in by the attorney of a party indicted for a felonious assault with intent to rob.”—*McQuillan vs. State*, 8 S. & M., p. 587.

977. (§ 259.) If the indictment is for a felony, the defendant must be personally present; but if for a misdemeanor, he may appear upon the arraignment by counsel.

Defendant, when to be present at arraignment.

NOTE.—See *McQuillan vs. State*, 8 S. & M., p. 587; *People vs. Corbett*, 28 Cal., p. 328.

978. (§ 260.) When his personal appearance is necessary, if he is in custody, the Court may direct and the officer in whose custody he is must bring him before it to be arraigned.

If in custody, to be brought before Court.

979. (§ 261.) If the defendant has been discharged on bail, or has deposited money instead thereof, and do not appear to be arraigned when his personal attend-

If discharged on bail, bench warrant to issue.

ance is necessary, the Court, in addition to the forfeiture of the undertaking of bail or of the money deposited, may direct the Clerk to issue a bench warrant for his arrest.

Bench
warrant,
by whom
and how
issued.

980. (§ 262.) The Clerk, on the application of the District Attorney, may, at any time after the order, whether the Court is sitting or not, issue a bench warrant to one or more counties.

Form of
bench
warrant.

981. (§ 263.) The bench warrant upon the indictment must, if the offense is a felony, be substantially in the following form:

COUNTY OF —.

The People of the State of California to any Sheriff, Constable, Marshal, or Policeman in this State:

An indictment having been found on the — day of —, A. D. eighteen —, in the County Court of the County of —, charging C. D. with the crime of — (designating it generally); you are therefore commanded forthwith to arrest the above named C. D., and bring him before that Court (or if the indictment has been sent to another Court, then before that Court, naming it), to answer said indictment; or if the Court have adjourned for the term, that you deliver him into the custody of the Sheriff of the County of —.

Given under my hand, with the seal of said Court affixed, this — day of —, A. D. —.

By order of said Court.

[SEAL.]

E. F., Clerk.

NOTE.—Stats. 1863, p. 158.

Directions
in the
bench war-
rant, if the
offense is
bailable.

982. (§§ 264, 265, 266.) The defendant, when arrested under a warrant for an offense not bailable, must be held in custody by the Sheriff of the county in which the indictment is found, unless admitted to bail after an examination upon a writ of habeas corpus; but if the offense is bailable, there must be added to the body of the bench warrant a direction to the following effect: "or, if he requires it, that you take him before any magistrate in that county, or in the county

in which you arrest him, that he may give bail to answer to the indictment;" and the Court, upon directing it to issue, must fix the amount of bail, and an indorsement must be made thereon and signed by the Clerk, to the following effect: "The defendant is to be admitted to bail in the sum of — dollars."

Order for
bail to be
indorsed.

983. (§ 267.) The bench warrant may be served in any county, in the same manner as a warrant of arrest, except that when served in another county it need not be indorsed by the magistrate of that county.

Bench war-
rant. how
served.

NOTE.—See "Arrest," Secs. 841-851, ante, and notes; how, by whom, and by what means made.

984. (§ 268.) If the defendant is brought before a magistrate of another county for the purpose of giving bail, the magistrate must proceed in respect thereto in the same manner as if the defendant had been brought before him upon a warrant of arrest, and the same proceedings must be had thereon.

Proceeding
on giving
bail in
another
county.

985. When the indictment is for a felony, and the defendant, before the finding thereof, has given bail for his appearance to answer the charge, the Court to which the indictment is presented, or in which it is pending, may order the defendant to be committed to actual custody, unless he gives bail in an increased amount, to be specified in the order.

Ordering
defendant
into
custody or
increasing
bail when
indictment
is for felony

the order.

986. (§ 270.) If the defendant is present when the order is made, he must be forthwith committed. If he is not present, a bench warrant must be issued and proceeded upon in the manner provided in this Chapter.

Defendant,
if present
when order
made, to be
committed;
if not,
bench
warrant
to issue.

987. (§ 271.) If the defendant appears for arraignment without counsel, he must be informed by the Court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of

Defendant,
on arraign-
ment, to be
informed of
his right to
counsel.

When
Court to
assign
counsel.

counsel. If he desires and is unable to employ counsel, the Court must assign counsel to defend him.

NOTE.—Art. I, Sec. 8, Const. The Court of Sessions, which corresponds to the County Court in jurisdiction in impaneling Grand Juries, was not bound to assign counsel to the defendant.—People vs. Moice, 15 Cal., p. 230.

Arraign-
ment, how
made.

988. (§ 272.) The arraignment must be made by the Court, or by the Clerk or District Attorney, under its direction, and consists in reading the indictment to the defendant and delivering to him a copy thereof and of the indorsements thereon, including the list of witnesses, and asking him whether he pleads guilty or not guilty to the indictment.

NOTE.—See note to Sec. 976, ante; also, notes to Secs. 858, 859, ante. Arraignment is defined by Bouv., vol. 1, p. 143, to be "calling the defendant to the bar of the Court to answer the accusation contained in the indictment." At common law the defendant was called to the bar by his name, and he was commanded to *hold up his hand*. This was to completely identify him; but the holding up the hand is not now required; he simply stands up, and his name is obtained as provided in the next section. Silence or a refusal to speak is alike an admission of the name as his true name, and in it he may be proceeded against.—See 1 W. Blackst., 33 Archibald Crim. Plead., 1859 ed.; 1 Whar. Am. Cr. Law, Sec. 530, p. 128. The indictment is then read to the defendant to enable him fully to understand the charge made against him. The reading must be so that he may distinctly hear it, including the indorsement. If the identity of the name is not already determined it is then done, and a proper record of the proceedings to identify the name made. The officer who read the indictment, or the Court, then addressing the defendant by the name fixed as his true name, who is still standing, says to him: "How say you, A. B., are you guilty or not guilty." Whatever the plea of the defendant, it is entered and proceeded upon as provided in Secs. 1016-1024, post. See, also, as to proceedings on arraignment, 1 Mass., p. 95; id., p. 103; 13 id., p. 299; 9 id., p. 402; 10 Metc., p. 222; 4 v. Crim. Pl., 14 Lond. ed., p. 129; Carrington's Crim. Law, p. 57; 3 Carr. & K., p. 121; Roscoe Cr. Ev., 4 Lond. ed., p. 215. See case of the deaf person who could not be prevailed on to plead.—1 Leach Cr. Cases, fourth

ed., p. 102; Comm. vs. Hill, 14 Mass., p. 207; 7 Carr. & P., p. 303; 6 Cox Cr. Cases, p. 386; 3 Carr. & K., p. 328; State vs. De Wolf, Conn. R., p. 93; Russ., vol. 1, pp. 6, 7, note *f*. When arraigned, time to plead may be extended one day or more, on request of defendant or counsel.—See Sec. 990, post. A copy of the indictment is given to defendant for the same reason, with greater force, that a copy of the complaint is required to be served on the defendant in a civil action.

989. (§§ 273, 274, 275.) When the defendant is arraigned, he must be informed that if the name by which he is indicted is not his true name, he must then declare his true name, or be proceeded against by the name in the indictment. If he gives no other name the Court may proceed accordingly; but if he alleges that another name is his true name, the Court must direct an entry thereof in the minutes of the arraignment, and the subsequent proceedings on the indictment may be had against him by that name, referring also to the name by which he is indicted.

Proceedings on arraignment when defendant is not indicted by his true name.

NOTE.—See note to Sec. 988, ante. See 1 Russ. on Cr., pp. 6, 7, note *f*; 1 Whar. Am. Cr. Law, Secs. 530–532, et seq., and notes.

990. (§§ 276, 277.) If, on the arraignment, the defendant requires it, he must be allowed a reasonable time, not less than one day, to answer the indictment. He may, in answer to the arraignment, move to set aside, demur, or plead to the indictment.

Time allowed, and how defendant may answer on arraignment.

NOTE.—In misdemeanors, the defendant may plead by his attorney, and need not be present, but in felonies he must be present and plead in person, under the advice of his counsel. Under a plea of guilty, if the indictment is found not to charge an offense, none is confessed.—Fletcher vs. State, 7 Eng., p. 169; 1 Whar. Am. Cr. Law, Sec. 533. It is a matter of discretion to allow the withdrawal of a plea of guilty, and it has been permitted even after overruling motion for a new trial.—State vs. Cotton, 4 Foster, N. H., p. 143; Davis vs. State, 20 Georgia, p. 674; 1 Whart. A. C. L., p. 338.

CHAPTER II.

SETTING ASIDE THE INDICTMENT.

SECTION 995. Indictment, when set aside on motion.

996. Defendant waives objections, unless he makes the motion.

997. Motion, when heard. If denied or granted, what proceedings are to be had.

998. Effect of order for submission.

999. Order no bar to another prosecution.

Indictment, when set aside on motion.

995. (§§ 278, 279.) The indictment must be set aside by the Court in which the defendant is arraigned, upon his motion, in either of the following cases:

1. Where it is not found, indorsed, and presented as prescribed in this Code;

2. When the names of the witnesses examined before the Grand Jury, or whose depositions may have been read before them, are not inserted at the foot of the indictment, or indorsed thereon;

3. When a person is permitted to be present during the session of the Grand Jury, and when the charge embraced in the indictment is under consideration, except as provided in Section 925;

4. When the defendant had not been held to answer before the finding of the indictment, on any ground which would have been good ground for challenge, either to the panel or to any individual Grand Juror.

NOTE.—The grounds for setting aside an indictment are entirely different from those of the demurrer. The former go to matters occurring prior to the finding of the indictment, as also to its presentation and indorsement, whilst the grounds of demurrer must appear on the face of, or in the contents of the indictment.

Subd. 1.—See Sec. 941, ante, and note; *People vs. Lawrence*, 31 Cal., p. 368.

Subd. 2.—See Sec. 943, ante, and note; *People vs. Symonds*, 22 Cal., p. 348; *People vs. Freeland*, 6 Cal., p. 96; *People vs. King*, 28 Cal., p. 265.

Subd. 3.—See Secs. 906, 919, 920, 925, ante, and notes.

Subd. 4.—Under Sec. 894, ante, one held to answer may challenge Grand Jury; one not so held has no such

opportunity.—People vs. Colmere, 23 Cal., p. 631; People vs. Turner, 39 Cal., p. 377.

The motion provided for in this section must be made before the defendant pleads or demurs. If not so made, the defendant is precluded from afterwards taking the objections which he is allowed to present thereon.—People vs. Stacey, 34 Cal., p. 308; People vs. Lawrence, 21 Cal., p. 368; People vs. Freeland, 6 Cal., p. 98; People vs. Lopez, 26 Cal., p. 112; People vs. King, 28 Cal., p. 272.

One held to answer a charge must, prior to the impaneling of the Grand Jury before which his case comes, interpose his challenge to Grand Jurors for cause; it is too late after indictment or arraignment.—People vs. Colmere, 23 Cal., p. 631. Excusing persons from serving on the Grand Jury will not be presumed to have been done without good cause or grounds, but the contrary.—People vs. Millsaps, 35 Cal., p. 47. In an appeal from an order refusing a new trial, on motion based on errors occurring during the trial, the Court will not examine the indictment as to its sufficiency.—People vs. Phipps, 39 Cal., p. 326.

996. (§ 280.) If the motion to set aside the indictment is not made, the defendant is precluded from afterwards taking the objections mentioned in the last section.

Defendant waives objections unless he makes the motion.

NOTE.—See note to Sec. 965, ante, and cases there cited.

997. (§§ 281, 282, 283.) The motion must be heard at the time it is made, unless for cause the Court postpones the hearing to another time. If the motion is denied, the defendant must immediately answer the indictment, either by demurring or pleading thereto. If the motion is granted, the Court must order that the defendant, if in custody, be discharged therefrom; or, if admitted to bail, that his bail be exonerated; or, if he has deposited money instead of bail, that the same be refunded to him, unless it directs that the case be resubmitted to the same or another Grand Jury.

Motion, when heard.

If denied or granted, what proceedings are to be had.

Effect of
order for
submission.

998. (§§ 284, 285.) If the Court directs the case to be resubmitted, the defendant, if already in custody, must so remain, unless he is admitted to bail; or, if already admitted to bail, or money has been deposited instead thereof, the bail or money is answerable for the appearance of the defendant to answer a new indictment; and, unless a new indictment is found before the next Grand Jury of the county is discharged, the Court must, on the discharge of such Grand Jury, make the order prescribed by the preceding section.

NOTE.—The defendant is regarded as still held to answer, and may again challenge the Grand Jury as in the first instance.

Order no
bar to
another
prosecu-
tion.

999. (§ 286.) An order to set aside an indictment, as provided in this Chapter, is no bar to a future prosecution for the same offense.

CHAPTER III.

DEMURRER.

SECTION 1002. Pleading on part of defendant.

1003. Demurrer or plea, when put in.

1004. Grounds of demurrer.

1005. Demurrer, how put in, and its form.

1006. When heard.

1007. Judgment on demurrer.

1008. If allowed, bar to another prosecution; when.

1009. If resubmission not ordered, defendant discharged, etc.

1010. Proceedings, if submission ordered.

1011. Proceedings, if demurrer is disallowed.

1012. When objections, forming ground of demurrer, must or may be taken.

Pleading
on part of
defendant.

1002. (§ 287.) The only pleading on the part of the defendant is either a demurrer or a plea.

Demurrer
or plea,
when
put in.

1003. (§ 288.) Both the demurrer and plea must be put in, in open Court, either at the time of the

arraignment or at such other time as may be allowed to the defendant for that purpose.

NOTE.—See Secs. 976-990, ante, and notes.

1004. (§ 289.) The defendant may demur to the indictment when it appears upon the face thereof, either:

Grounds of demurrer.

1. That the Grand Jury by which it was found had no legal authority to inquire into the offense charged, by reason of its not being within the legal jurisdiction of the county;

2. That it does not substantially conform to the requirement of Sections 950, 951, and 952;

3. That more than one offense is charged in the indictment;

4. That the facts stated do not constitute a public offense; — § sec 810 I. R. Nichols C.

5. That the indictment contains any matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution.

NOTE.—Objections to the sufficiency of the indictment upon any of the grounds of demurrer specified in this section, must be made prior to plea, and cannot be considered in arrest of judgment (except the fourth subdivision, under which, of course, if no offense is charged, no conviction can be had.)—See note to Sec. 990, ante; *People vs. Josephs*, 7 Cal., p. 129; *People vs. Apple*, id., p. 289; *People vs. Glenn*, 10 Cal., p. 37; *People vs. Shotwell*, 27 Cal., p. 394; *People vs. King*, 28 Cal., p. 265; *People vs. Turner*, 39 Cal., p. 370.

Subd. 1.—Jurisdiction.—*People vs. Mellon*, 40 Cal., p. 48; see Secs. 777-794, ante, and notes.

Subd. 2.—Specific requirements of indictments.

Subd. 3.—*People vs. Shotwell*, 27 Cal., p. 394; *People vs. Burgess*, 35 Cal., p. 115.

Subd. 4.—This note supra, and note to Sec. 990, ante.

Subd. 5.—Legal bars, and abatements, limitation, statutory permission, etc., and the like, see "Pleas," post. Several of the grounds of demurrer may be plead otherwise. A failure to demur at the proper time is a waiver of the defect.—*People vs. Burgess*, 35 Cal., p. 115.

1004. A demurrer to an indictment that it charges two offenses, is permitted. *People v. Taggart*, 43 Cal. 81.

See
1185
1012
1006-7-8

Demurrer,
how put in,
and its
form.

1005. (§ 290.) The demurrer must be in writing, signed either by the defendant or his counsel, and filed. It must distinctly specify the grounds of objection to the indictment, or it must be disregarded.

NOTE.—As to sufficiency of the indictment, which must be distinctly specified, see Sec. 959, ante, and note; also, references therein to notes under heads of "Larceny," "Burglary," "Forgery," etc. Description of *property* insufficient and ground of demurrer, see *People vs. Cox*, 40 Cal., p. 275. *Offense*.—*People vs. Phipps*, 39 Cal., p. 326. Of owner of property.—*People vs. Bogart*, 36 Cal., p. 245. Judgment sustaining a demurrer may be appealed from.—*People vs. Ah Own*, 39 Cal., p. 604.

When
heard.

1006. (§ 291.) Upon the demurrer being filed, the argument upon the objections presented thereby must be heard, either immediately or at such time as the Court may appoint.

Judgment
on
demurrer.

1007. (§ 292.) Upon considering the demurrer, the Court must give judgment, either allowing or disallowing it, and an order to that effect must be entered upon the minutes.

If allowed,
bar to an-
other pros-
ecution,
when.

1008. (§ 293.) If the demurrer is allowed, the judgment is final upon the indictment demurred to, and is a bar to another prosecution for the same offense, unless the Court, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment, directs the case to be resubmitted to the same or another Grand Jury.

If resub-
mission not
ordered,
defendant
discharged,
etc.

1009. (§ 294.) If the Court does not direct the case to be resubmitted, the defendant, if in custody, must be discharged, or if admitted to bail, his bail is exonerated, or if he has deposited money instead of bail, the money must be refunded to him.

Proceed-
ings, if
submission
ordered.

1010. (§ 295.) If the Court directs that the case be resubmitted, the same proceedings must be had thereon as are prescribed in Sections 997 and 998.

NOTE.—Defendant must again make objections, by challenge to the Grand Jury when they are being impaneled, or lose them.

1011. (§ 296.) If the demurrer is disallowed, the Court must permit the defendant, at his election, to plead, which he must do forthwith, or at such time as the Court may direct. If he does not plead judgment may be pronounced against him.

Proceedings, if demurrer is disallowed.

NOTE.—If the indictment charges no offense, he is adjudged guilty of none, and it may be taken advantage of in arrest of judgment.

1012. (§ 297.) When the objections mentioned in Section 1004 appear upon the face of the indictment, they can only be taken by demurrer, except that the objection to the jurisdiction of the Court over the subject of the indictment, or that the facts stated do not constitute a public offense, may be taken at the trial, under the plea of not guilty, or after the trial, in arrest of judgment.

When objections, forming ground of demurrer, must or may be taken.

CHAPTER IV.

PLEA.

SECTION 1016. The different kinds of pleas.

1017. Plea, how put in, and its form.

1018. Plea of guilty, how put in, and when it may be withdrawn.

1019. What plea of not guilty puts in issue.

1020. What may be given in evidence under plea of not guilty.

1021. What is not a former acquittal.

1022. What is a former acquittal.

1023. Conviction or acquittal on an indictment for a higher offense, effect of.

1024. Defendant refusing to answer, plea of not guilty to be entered.

The different kinds of pleas.

1016. (§ 298.) There are three kinds of pleas to an indictment. A plea of:

1. Guilty;
2. Not guilty;
3. A former judgment of conviction or acquittal of the offense charged, which may be pleaded either with or without the plea of not guilty.

NOTE.—*Subd. 1.*—A plea of guilty of a misdemeanor may be by attorney, but in a felony it must in all cases be put in by the defendant.—See *People vs. Ebner*, 23 Cal., p. 158; *McQuillan vs. State*, 8 S. & M., p. 587; *People vs. Corbett*, 28 Cal., p. 328; 1 Whart. Am. Cr. Law, Sec. 530, p. 337; *U. S. vs. Mayo*, 1 Curtis C. C., p. 433.

Subd. 2.—See Sec. 1019, post. Must be put by the defendant or attorney as supra. Defendants have a right to plead severally, but “not guilty” by all the defendants is, in law, a several plea.—1 Whart. Am. Cr. Law, p. 337; *State vs. Smith*, 2 Iredell, p. 402.

Subd. 3.—This changes a rule against *double pleading*. It has been frequently held elsewhere that these two pleas could not be interposed at the same time.—See 1 Whart. Am. Cr. Law., p. 337, Sec. 530, and cases there cited; see, generally, *People vs. Thompson*, 4 Cal., p. 238. In the case of *People vs. Lee*, 17 Cal., p. 76, it was held to be discretionary with the Court to allow or refuse the withdrawal of a plea of not guilty, so as to move to set aside the indictment, and the Supreme Court will not reverse an order of refusal when no abuse of discretion is shown. If the defendant, after demurrer overruled, refuses or declines to plead, and the Court enters or has entered a plea of not guilty, and a trial by jury proceeds wherein he is found guilty, it is not error.—*People vs. King*, 28 Cal., p. 265. This was held to be the proper course in *People vs. Joselyn*, 29 Cal., p. 562. Though there was no judgment pronounced, on a plea of guilty entered of record, it is a good defense if pleaded to another indictment for the same offense.—*People vs. Goldstein*, 32 Cal., p. 432. When, on indictment for murder, the defendant was found guilty of manslaughter, on a second indictment for murder the former conviction of manslaughter was a good plea to the second indictment, though a new trial was granted on the motion of defendant.—*People vs. Gilmore*, 4 Cal., p. 376; *People vs. Backus*, 5 Cal., p. 278. *People vs. Apgar*, 35 Cal.,

See § 1429
1387
1017

p. 391, declares "an indictment, by operation of law, for murder, is also an indictment for manslaughter, and every less offense that may be included under the charge of murder, as much as though it were charged in distinct and separate counts." Hence a conviction of manslaughter is an acquittal of every other offense of a higher grade charged or included in the charge in the indictment for murder; and so with all other offenses included within an indictment. See, as to "bar," *People vs. Marsh*, 6 Cal., p. 543; "variance," *People vs. McNealy*, 17 Cal., p. 332. Acquittal, by discharge of defendant, to be used as a witness.—*People vs. Bruzzo*, 24 Cal., p. 41. For pleas in "bar," "abatement," "to jurisdiction," "former conviction or acquittal," etc., see 1 Whart. Am. Cr. Law, pp. 337-354, et alia.

INSANITY.—Under the plea of not guilty, the insanity of the defendant, at the time of the killing, may be given in evidence.—See *People vs. Olwell*, 28 Cal., p. 461. In *The People vs. Coffman*, 24 Cal., p. 235, the Court say: "The unsoundness of mind, or insanity, that will constitute a defense in criminal actions is *well described* by Tindal, C. J." In answer to questions propounded by the House of Lords to the Judges, cited in Roscoe's Cr. Ev., p. 953, he says: "That to establish a defense on the ground of insanity, it must be clearly proved that, at the *time* of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the *nature or quality of the act*; or if he did know it, that he did not know he was doing *what was wrong*." There can be, say the Court, no question that in a criminal case, if the defendant relies upon insanity for his defense, the burden of proof is cast upon him, and that the allegation of insanity is an affirmative proposition which must be fully and clearly proved, in order to rebut the presumption of sanity. The instruction: "This defendant is presumed to be sane until the contrary is shown; and a doubt upon this question alone should not acquit, for insanity is an affirmative proposition, and should be made to appear beyond any reasonable doubt," was held to be correct. The evidence on this subject should be such, that were the question one of the sanity or insanity of the defendant, without reference to any other question or results, the verdict would be that the defendant was insane at the time he committed the act. This ruling was adhered to in the famous *Laura D. Fair* case, by Judge T. B. Reardon, sitting for Dwinelle, J., and may be said to be the fixed and settled rule in this State. The pre-

1016. The plea of a defendant confessing himself guilty of a crime, should not be entered, except with his express consent, given by him personally in directions in open Court. *People v. McCrory*, 41 Cal. 458. No plea of present insanity is required. It, at any time during the trial, a doubt arises as to the sanity of the defendant, it is the duty of the Court of its own motion, to suspend further proceedings in the case until the question of sanity has been determined. *People v. Ah Ying*, 42 Cal. 18. Counsel for defendant cannot waive the inquiry. *Id.* Drunkenness cannot be given in evidence, as an excuse for crime; but when in a case of homicide, the jury are to pass on the question of premeditation, for the purpose of fixing the degree of the crime, drunkenness may be taken into consideration, for the purpose solely of passing on the fact of premeditation, keeping in view the fact that a drunken man may act with premeditation as well as a sober one. *People v. Williams*, 43 Cal. 344. Mere threats antecedently made amount to no excuse for a deadly assault, when the party assailed has a univocal character. *People v. Renfrow*, 45 Cal. 45. Drunkenness is not admissible. *People v. Renfrow*, 45 Cal. 45.

assumption of the law is that the defendant was sane and the contrary is shown by a preponderance of proof. *People vs. Myers*, 20 Cal., p. 518; see, also, *People v. March*, 6 Cal., p. 543. The insanity of the defendant and parents may be shown when there appears to be a motive for the killing, or there is any evidence of the insanity of the defendant.—*People vs. Smith*, 31 Cal. p. 466. In *The People vs. Farrell*, 31 Cal., p. 57, where the defendant was indicted for rape, the Court say: "An act done by a person in a state of insanity

is not punished as a public offense, nor can a person be judged to punishment, or punished for a crime while insane. The proceedings to be taken in such cases are pointed out by Chapter VI, Section II, of this Code, Secs. 1867-1873, provided that in these proceedings must be as to the state of mind; but evidence before and after the act charged may be given.—*People v. Smith*, 31 Cal. p. 466. It is often as any doubt of the defendant's sanity, the jury must find him sane.

Drunkenness is given in evidence, not as a defense, but to determine the state or condition of the defendant at the time of the crime, and to determine its capacity to form an intention. In murder cases, the capacity for deliberation and premeditation is a question of the degree of guilt, (*People v. Smith*, 34 Cal., p. 212), in the instructions of the Court. *People v. Renfrow*, 45 Cal. 45. It is now, pronounced to be beyond criticism by the Sup. Court. Also, *People vs. King*, 27 Cal., p. 507, it was held not to go in extenuation or to afford an excuse for the offense, but to determine the degree. See, also, *People vs. Harris*, 29 Cal., p. 678; *People vs. Belencia*, 21 Cal., p. 554. Such evidence to be received with great caution, for a drunken man may act with premeditation as well as any other. See, also, *People vs. Lewis*, 36 Cal., p. 531. See, also, "Drunkenness," 1 Whart. Am. Cr. Law, Secs. 33, 37, 41, and notes.

1017. (§§ 299, 300.) Every plea must be oral, and entered upon the minutes of the Court in substantially the following form:

Plea, how put in, and its form.

1. If the defendant plead guilty, "The defendant pleads that he is guilty of the offense charged in this indictment."

2. If he plead not guilty, "The defendant pleads that he is not guilty of the offense charged in this indictment."

3. If he plead a former conviction or acquittal, "The defendant pleads that he has already been convicted (or acquitted) of the offense charged in this indictment, by the judgment of the Court of — (naming it), rendered at — (naming the place), on the — day of —."

NOTE.—See note to preceding section.

1018. (§§ 301, 302.) A plea of guilty can be put in by the defendant himself only in open Court, unless upon indictment against a corporation, in which case it may be put in by counsel. The Court may at any time before judgment, upon a plea of guilty, permit it to be withdrawn and a plea of not guilty substituted.

Plea of guilty, how put in, and when it may be withdrawn.

NOTE.—See note to Sec. 1016, ante. In New York, the plea of guilty can only be put in by the defendant in person, even to charges of misdemeanors, excepting only in cases of corporations. We regard our Code as sufficiently careful in this respect.

1019. (§ 303.) The plea of not guilty puts in issue every material allegation of the indictment.

What plea of not guilty puts in issue.

NOTE.—See note to Sec. 1016, ante. Under this plea insanity may be shown.—See *People vs. Olwell*, 28 Cal., p. 461.

1020. (§ 304.) All matters of fact tending to establish a defense other than that specified in the third subdivision of Section 1016 may be given in evidence under the plea of not guilty.

What may be given in evidence under plea of not guilty.

NOTE.—See "Insanity," in note to Sec. 1016, ante; also, for what purposes drunkenness may be shown.

What is not
a former
acquittal.

† 1021. (§ 305.) If the defendant was formerly acquitted on the ground of variance between the indictment and the proof, or the indictment was dismissed upon an objection to its form or substance, or in order to hold the defendant for a higher offense, without a judgment of acquittal, it is not an acquittal of the same offense.

NOTE.—As to what variance entitles defendant to acquittal, see 1 Whart. Am. Cr. Law, Secs. 558, 559, and notes; see, also, note to Sec. 1016, ante. See Sec. 1112, post, as to dismissal of jury and holding defendant for higher offense.

What is a
former
acquittal.

1022. (§ 306.) Whenever the defendant is acquitted on the merits, he is acquitted of the same offense, notwithstanding any defect in form or substance in the indictment on which the trial was had.

Conviction
or acquittal
on an
indictment
for a higher
offense,
effect of.

1023. (§ 307.) When the defendant is convicted or acquitted upon an indictment, the conviction or acquittal is a bar to another indictment for the offense charged in the former, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that indictment.

NOTE.—See note to Sec. 1016, ante, Subd. 3, under which the defense provided for in this and the preceding section must be entered.

Defendant
refusing to
answer
plea of not
guilty to be
entered.

1024. (§ 308.) If the defendant refuses to answer the indictment by demurrer or plea, a plea of not guilty must be entered.

NOTE.—Stats. 1851, p. 212, et al. See *People vs. King*, 28 Cal., p. 265; *People vs. Joselyn*, 29 Cal., p. 562.

X 1021. Acquittal for variance when a bar to subsequent prosecution. *People v. Hughes*, 41 Cal. 234. Discharge of jury because unable to agree, when not an acquittal. *Ex-parte McLaughlin*, 41 Cal. 211. Former trial when a bar. *Ex-parte Hartman*, 44 Cal. 32. Failure of jury to agree, before adjournment of term, when a bar. *Ex-parte Cage*, 45 Cal. 248.

1025. When a defendant, who is charged in the indictment with having suffered a previous conviction, pleads either guilty or not guilty of the offense for which he is indicted, he must be asked whether he has suffered such previous conviction. If he answers that he has, his answer shall be entered by the clerk in the minutes of the Court, and shall, unless withdrawn by consent of the Court, be conclusive of the fact of his having suffered such previous conviction in all subsequent proceedings. If he answers that he has not, his answer shall be entered by the clerk in the minutes of the Court, and the question whether or not he has suffered such previous conviction, shall be tried by the jury which tries the issue upon the plea of "not guilty," in case of a plea of "guilty," by a jury impaneled for that purpose. The refusal of the defendant to answer shall be equivalent to a denial that he has suffered such previous conviction. In case the defendant pleads "not guilty," and answers that he has suffered the previous conviction, the charge of the previous conviction shall be read to the jury, nor alluded to on the trial.

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NOTE.—Stats. 1863, p. 158, Sec. 11. These offenses are only triable in the District Court by requirement of the Constitution; hence the provision for their removal.

1029. All indictments found against a County Judge must also be transmitted to a District Court of the county for trial.

NOTE.—Stats. 1863, p. 158, Sec. 12. For obvious reasons this removal is necessary.

1030. All indictments found in the County Court of the City and County of San Francisco must be transmitted by the Clerk to the Municipal Criminal Court of the City and County of San Francisco, except those against the Judge of the last mentioned Court and those triable in the District Court.

NOTE.—Stats. 1870, p. 529, Sec. 12.

Transmission of indictments from the County to District Courts.

Indictments against a County Judge to be transmitted to District Court.

Indictments to be transmitted to the Municipal Criminal Court of San Francisco.

CHAPTER VI.

REMOVAL OF THE ACTION BEFORE TRIAL.

SECTION 1033. When action may be removed.

1034. Application for removal, how made.

1035. Application, when granted.

1036. Order of removal.

1037. Proceedings on removal, if defendant is in custody.

1038. Authority of Court to which action is removed. When original papers must be transmitted.

When
action may
be removed

1033. (§ 312.) A criminal action, prosecuted by indictment, may be removed from the Court in which it is pending on the application of the defendant, on the ground that a fair and impartial trial cannot be had in the county where the indictment is pending.

NOTE.—For removal of actions on account of partiality or prejudice of the Judge.—See 3 Whar. Am. Cr. Law, pp. 423, 424, Sec. 2045, et seq.

Applica-
tion for
removal,
how made.

1034. (§ 313.) The application must be made in open Court, and in writing, verified by the affidavit of the defendant, a copy of which must be served on the District Attorney at least one day before the application is made. Whenever the affidavit shows that the defendant cannot safely appear in person to make the application, because the popular excitement against him is so great as to endanger his personal safety, and such statement is sustained by other testimony, the application may be made by counsel, and heard and determined in the absence of the defendant, though he is indicted for felony, and has not at the time of such application been arrested, or given bail, or been arraigned, or pleaded or demurred to the indictment.

NOTE.—Stats. 1857, p. 71. An affidavit which states in general terms that *defendant* cannot have a fair trial, or that *he believes* he cannot have a fair trial, is *not sufficient*.—People vs. McCauley, 1 Cal., p. 379. Nor is the affidavit of defendant alone sufficient.—People vs. Graham, 21 Cal., p. 261. Nor to state that a

jury could not be selected from Stockton, for Stockton does not constitute the entire county.—*People vs. Baker*, 1 Cal., p. 404. Nor to state generally that the people of the county *are prejudiced* against defendant.—*People vs. Shuler*, 28 Cal., p. 490. Nor is it a sufficient fact that thirty or forty persons contributed to pay counsel to assist the District Attorney to show such general prejudice as to require a change of venue.—*People vs. Graham*, 21 Cal., p. 261. Nor will the affidavit of the defendant of general prejudice supported solely by a failure to get a jury the first day on account of opinions found. In all cases the Court has a discretion which must be reasonable.—*People vs. Mahony*, 18 Cal., p. 180. Nor is the bias or prejudice of the Judge of the Court an incapacity to try the case which authorizes a change of venue.—*People vs. Williams*, 24 Cal., p. 31; *Shuler's Case*, *supra*. Erroneous rulings constitute no evidence of bias. Neither is an affidavit of prejudice by Sheriff and deputies. The law-making power of the State may consent to a change of venue.—*Ex Rel. Smith vs. Twelfth Dist. Judge*, 17 Cal., p. 547.

1035. (§ 314.) If the Court is satisfied that the representation of the defendant is true, an order must be made for the removal of the action to the proper Court of a county free from a like objection.

Applica-
tion. when
granted.

NOTE.—Stats. 1863, p. 158, Sec. 14.

1036. (§ 315.) The order of removal must be entered upon the minutes, and the Clerk must immediately make out and transmit to the Court to which the action is removed a certified copy of the order of removal record, pleadings, and proceedings in the action, including the undertakings for the appearance of the defendant and of the witnesses.

Order of
removal.

1037. (§ 316.) If the defendant is in custody, the order must direct his removal, and he must be forthwith removed by the Sheriff of the county where he is imprisoned, to the custody of the Sheriff of the county to which the action is removed.

Proceed-
ings on
removal, if
defendant
is in
custody.

Authority
of Court to
which
action is
removed.

When
original
papers
must be
trans-
mitted.

1038. (§ 317.) The Court to which the action is removed must proceed to trial and judgment therein as if the action had been commenced in such Court. If it is necessary to have any of the original pleadings or other papers before such Court, the Court from which the action is removed must at any time, upon application of the District Attorney or the defendant, order such papers or pleadings to be transmitted by the Clerk, a certified copy thereof being retained.

CHAPTER VII.

THE MODE OF TRIAL.

SECTION 1041. Issue of fact defined.

1042. How tried.

1043. When presence of defendant is necessary on the trial.

Issue of
fact
defined.

1041. (§ 318.) An issue of fact arises:
1. Upon a plea of not guilty; or,
2. Upon a plea of a former conviction or acquittal of the same offense.

NOTE.—See issue of fact defined, Code of Civil Procedure, Sec. 590. Under statute against perjury, when issue is made up.—See *People vs. McCarthy*, 29 Cal., p. 395.

How tried.

1042. (§ 319.) Issues of fact must be tried by jury.

NOTE.—Art I, Sec. 3, Const.

When
presence of
defendant
is necessary
on the trial.

1043. (§ 320.) If the indictment is for a felony, the defendant must be personally present at the trial; but if for misdemeanor, the trial may be had in the absence of the defendant; if, however, his presence is necessary for the purpose of identification, the Court may, upon application of the District Attorney, by an order or warrant, require the personal attendance of the defendant at the trial.

NOTE.—Stats. 1863, p. 158. See notes to Secs. 976, 1016, ante. Definitions of felony and misdemeanor.—See Sec. 17, ante.

CHAPTER VIII.

FORMATION OF THE TRIAL JURY AND THE CALENDAR OF ISSUES FOR TRIAL.

SECTION 1046. Formation of trial jury.

1047. Clerk to prepare a calendar.

1048. Order of disposing of issues on the calendar.

1049. Defendant entitled to two days to prepare for trial.

1046. (§ 321.) Trial juries for criminal actions are formed in the same manner as trial juries in civil actions. — 250 Section C.C.P. Formation of trial jury.

NOTE.—See Code of Civil Procedure, Secs. 246, 247. Impaneling the trial jury. Secs. 600–604, id.—Formation of the jury. Secs. 198–201, id., given in note to Sec. 1075, post.—“Qualification and exemptions of jurors.” Secs. 190–195, and notes, id.—Jurors in general.

1047. (§ 322.) The Clerk must prepare a calendar of all criminal actions pending in the Court, enumerating them according to the date of the filing of the indictment, specifying opposite the title of each action whether it is for a felony or a misdemeanor, and whether the defendant is in custody or on bail. Clerk to prepare a calendar.

1048. The issues on the calendar must be disposed of in the following order, unless for good cause the Court shall direct an indictment to be tried out of its order: Order of disposing of issues on the calendar.

1. Indictments for felony, when the defendant is in custody;
2. Indictments for misdemeanor, when the defendant is in custody;
3. Indictment for felony, when the defendant is on bail;
4. Indictment for misdemeanor, when the defendant is on bail;

3. Indictments for felony, when the defendant is on bail;

4. Indictments for misdemeanor, when the defendant is on bail.

NOTE.—*Subds. 1-3.*—Felonies are crimes punishable with death or imprisonment in the State Prison.—Sec. 17, ante.

Subds. 2-4.—Misdemeanors are all crimes which are not felonies.—Id.

(Defendant entitled to two days to prepare for trial.

1049. (§ 324.) After his plea, the defendant is entitled to at least two days to prepare for trial.

NOTE.—See "Preparation," Index Whart. Am. Cr. Law.

CHAPTER IX.

POSTPONEMENT OF THE TRIAL.

SECTION 1052. Postponement, when, and how ordered.

Postponement, when, and how ordered.

1052. When an indictment is called for trial, or at any time previous thereto, the Court may, upon sufficient cause, direct the trial to be postponed to another day of the same, or of the next term.
~~the next term.~~

NOTE.—"Postponed" is here, and in fact throughout the Codes, used in the place of "continued," and "postponement" for "continuance." *Sickness of defendant's counsel* and consequent absence, is a good ground for postponement.—People vs. Logan, 4 Cal., p. 188. In this case, also, it appeared that though there were two counsel, the absent one had a fuller knowledge of the case than the one present.—See, also, 3 Wh. Am. Cr. Law, Sec. 2939, and notes. *Personal attendance of witnesses* is a right of the defendant if it can be had without unreasonable delay, and postponements therefor may be had.—People vs. Dodge, 28 Cal., p. 445; People vs. Dias, 6 Cal., p. 249; 3 Whart. Am. Cr. Law, Secs. 2930-2938, and notes. *Affidavits*, sufficiency of in application for postponement, considered and determined in the following cases: When it is agreed that the affidavit is sufficient to avoid a postponement.

Where there is a sufficient showing as to the materiality of absent witnesses, and no apparent lack of diligence in the effort to procure their attendance, a motion to continue a cause for the term, particularly if it be the first application, should be granted. People v. McCrory, 41 Cal. 458.

it is insufficient for the District Attorney to admit that the witnesses, if present, would swear to the facts as stated—he must admit the truth of the facts.—People vs. Dias, 6 Cal., p. 249. *The affidavit should show that the defendant has used due diligence to procure the attendance of the witness, setting out the facts constituting it.*—People vs. Baker, 1 Cal., p. 403; People vs. Thompson, 4 Cal., p. 218. To show the fact that a certain witness resides in another county is insufficient, though it is also shown that a subpoena was placed in the hands of the Sheriff of that other county, and a return made of “Not served.” People vs. Williams, 24 Cal., p. 31. The affidavit and proofs should show all the efforts made to procure the attendance of absent witnesses, and if subpoenas have or have not been served, *how* in the first case, and why not, and what has been done in the second. In each case the service, if had, must be such as would command obedience under the law. People vs. Joselyn, 29 Cal., p. 562, supports this position. It is the general rule that statements of belief will be insufficient; the grounds of belief, the character of the evidence, and its materiality must be shown. When the postponement is on the ground of surprise at not finding the name of a witness on the indictment who is proposed to be examined, the surprise must be shown by affidavit, or in some other proper form suggested.—People vs. Symonds, 22 Cal., p. 348. Particularly in the case of an absent witness resident out of the State must the grounds of belief be set out and the nature and character of the information. The showing must be to obtaining the presence of the witness, or it must be to obtaining his deposition; it must not be to either the one *or* the other, but as positive as may be as to the one or the other as a separate basis of the application.—People vs. Francis, 38 Cal., pp. 188, 189. See leading rules regulating “postponements,” and the exercise of this discretionary power of the Court, 3 Whar. Am. Cr. Law, pp. 411–415, et al., Sec. 2922, et seq., and cases there cited.

Handwritten notes on the right margin:
The affidavit should show that the defendant has used due diligence to procure the attendance of the witness, setting out the facts constituting it.
The grounds of belief, the character of the evidence, and its materiality must be shown.

TITLE VII.

OF PROCEEDINGS AFTER THE COMMENCEMENT OF
THE TRIAL AND BEFORE JUDGMENT.CHAPTER I. *Challenging the jury.*II. *The trial.*III. *Conduct of the jury after cause is
submitted to them.*IV. *The verdict.*V. *Bills of exception.*VI. *New trials.*VII. *Arrest of judgment.*

CHAPTER I.

CHALLENGING THE JURY.

SECTION 1055. Definition and division of challenges.

1056. Defendants cannot sever in challenges.

1057. Panel defined.

1058. Challenge to the jury defined.

1059. Upon what founded.

1060. When and how taken.

1061. If sufficiency of the challenge be denied, adverse party
may except. Exception, how taken and tried.

1062. If exception overruled, Court may allow denial, etc.

1063. Denial of challenge, how made, and trial thereof.
Who may be examined on trial of challenge.1064. Challenge when jury is summoned but not drawn, for
bias in summoning officer.1065. If challenge allowed, jury to be discharged; if dis-
allowed, to be impaneled.1066. Defendant to be informed of his right to challenge
individual jurors.

1067. Kinds of challenges to individual jurors.

1068. Challenge, when taken.

1069. Peremptory challenge, what, and how taken.

1070. Number of peremptory challenges.

1071. Definition and kinds of challenge, for cause.

1072. General causes of challenge.

1073. Particular causes of challenge.

SECTION 1074. Ground of challenge for actual bias.

1075. Exemption not a ground of challenge.

1076. Causes of challenge, how stated.

1077. Exceptions to challenge, and denial thereof.

1078. Challenge, how tried.

1079. Triers, how appointed. Majority may decide.

1080. Oath of triers.

1081. Juror challenged may be examined as a witness.

1082. Rules of evidence on trial of challenge.

1083. Challenge for implied bias, how determined.

1084. Instructions to triers on trial of challenge for actual bias.

1085. Verdict of triers, and its effect.

1086. Challenges, first by the defendant and then by the people.

1087. Order of challenges.

1088. Peremptory challenges may be taken after challenges for cause on both sides are exhausted.

1055. (§ 326.) A challenge is an objection made to the trial jurors, and is of two kinds:

Definition
and
division of
challenges.

1. To the panel;

2. To an individual juror.

NOTE.—"Challenge."—Bouvier's Law Dict.: "An exception to the jurors who have been arrayed to pass upon a cause on its trial." An exception to those who have been returned as jurors.—Coke Littleton, p. 155, b. Defendant is entitled to a lawful jury, but it is a qualified right, nevertheless. The law provides exemptions from jury duty, and one so exempt may not be compelled to serve, though drawn, and the like. This is supported by *People vs. Arceo*, 32 Cal., p. 50. A panel of jurors may be served after the term commences.—*People vs. Rodriguez*, 10 Cal., p. 50. It is not error for the Court to discharge a juror, notwithstanding the objection of the defendant.—*People vs. Lee*, 17 Cal., p. 76; *People vs. McCalla*, 8 Cal., p. 301. Jurors may be questioned in regard to having formed an opinion, etc., before being challenged for cause.—*People vs. Backus*, 5 Cal., p. 275. An allowance of a challenge on the part of the people which is improper is good ground for reversal of a verdict of guilty.—*People vs. Stewart*, 7 Cal., p. 140. See the case of *Arceo*, supra, on discretion of the Court to excuse jurors who speak different languages, under proviso to statute excepting Monterey, etc. *The People vs. Earnest*, October Term, 1872.

An indictment found by a jury which was summoned as a trial jury and impaneled as a Grand Jury is illegal. By the Court (Filed November 15th, 1872): The statute (Hit., Secs. 3918, 3919) requires that a copy of the order of the Court for the summoning of a Grand Jury should be delivered to the Sheriff, and that it shall be the duty of that officer to summon the Grand Jury "upon the receipt of the order," etc. In this case the only order delivered to the Sheriff was an order to summon twenty-four persons to serve as *trial* jurors. This *trial* jury was subsequently impaneled by the Court as a *Grand* Jury, and found the indictment upon which the prisoner was convicted, and his motion to set aside the indictment, duly made on that ground, was denied. Had a subpoena been issued to summon twenty-four witnesses in the case, there would have been just as much authority in the Court to impanel them as a Grand Jury as to impanel this trial jury as a Grand Jury. Judgment reversed and cause remanded, with directions to set aside the indictment, and for such further proceedings as may be proper.

Defendants
cannot
sever in
challenges.

1056. (§ 327.) When several defendants are tried together they cannot sever their challenges, but must join therein.

NOTE.—Challenges, peremptory and for cause, must be taken together and not severed.—People vs. McCalla, 8 Cal. p. 301.

Panel
defined.

1057. (§ 328.) The panel is a list of jurors returned by a Sheriff, to serve at a particular Court or for the trial of a particular action.

Challenge
to the jury
defined.

1058. (§ 329.) A challenge to the panel is an objection made to all the jurors returned, and may be taken by either party.

NOTE.—See Sec. 1064, post, and note.

Upon what
founded.

1059. (§ 330.) A challenge to the panel can be founded only on a material departure from the forms prescribed in respect to the drawing and return of the jury in civil actions, or on the intentional omission of the Sheriff to summon one or more of the jurors drawn.

NOTE.—Challenges to the panel were formerly challenges to the array: 1. Principal challenge to the array; 2. Challenge to the array for favor; of which, see Am. Cr. Law, 3 Whart., pp. 425, 426, Secs. 2947–2953, and notes. The statutory challenge to the panel is based on a departure from the statute providing for the drawing or an omission to summon the jury as required.—See note to Sec. 1046, ante.

1060. (§ 331.) A challenge to the panel must be taken before a juror is sworn, and must be in writing or be noted by the Phonographic Reporter, and must plainly and distinctly state the facts constituting the ground of challenge.

When and how taken.

NOTE.—See note to Sec. 1068, post, et alia.

1061. (§§ 332, 333.) If the sufficiency of the facts alleged as ground of the challenge is denied, the adverse party may except to the challenge. The exception need not be in writing, but must be entered on the minutes of the Court, or of the Phonographic Reporter, and thereupon the Court must proceed to try the sufficiency of the challenge, assuming the facts alleged therein to be true.

If sufficiency of the challenge be denied, adverse party may except. Exception, how taken and tried.

NOTE.—See note to Sec. 1076, post, and People vs. Bodine, there cited.

1062. (§ 334.) If, on the exception, the Court finds the challenge sufficient, it may, if justice requires it, permit the party excepting to withdraw his exception, and to deny the facts alleged in the challenge. If the exception is allowed, the Court may, in like manner, permit an amendment of the challenge.

If exception overruled, Court may allow denial, etc.

1063. (§§ 335, 336.) If the challenge is denied, the denial may be oral, and must be entered on the minutes of the Court, or of the Phonographic Reporter, and the Court must proceed to try the question of fact; and upon such trial, the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be

Denial of challenge, how made, and trial thereof.

Who may be examined on trial of challenge.

examined to prove or disprove the facts alleged as the ground of the challenge.

Challenge when jury is summoned but not drawn, for bias in summoning officer.

1064. (§ 337.) When the panel is formed from persons whose names are not drawn as jurors, a challenge may be taken to the panel on account of any bias of the officer who summoned them, which would be good ground of challenge to a juror. Such challenge must be made in the same form, and determined in the same manner, as if made to a juror.

NOTE.—The case of *The People vs. Coyodo*, 40 Cal., p. 592, involved the construction of this section; and the Court held that when the trial of a challenge shows that the Sheriff acting had formed and expressed an opinion that the defendant was guilty, the challenge to the panel, on the ground of the bias of the officer, should have been sustained.—See, also, *People vs. Rodriguez*, 10 Cal., p. 50.

If challenge allowed, jury to be discharged; if disallowed, to be impaneled.

1065. (§ 338.) If, either upon an exception to the challenge or a denial of the facts, the challenge is allowed, the Court must discharge the jury, so far as the trial of the indictment in question is concerned. If it is disallowed, the Court must direct the jury to be impaneled.

Defendant to be informed of his right to challenge individual jurors.

1066. (§ 339.) Before a juror is called, the defendant must be informed by the Court, or under its direction, that if he intends to challenge an individual juror he must do so when the juror appears, and before he is sworn.

Kinds of challenges to individual juror.

1067. (§ 340.) A challenge to an individual juror is either:

1. Peremptory; or,
2. For cause.

Challenge, when taken

1068. (§ 341.) It must be taken when the juror appears, and before he is sworn to try the cause; but the Court may for cause permit it to be taken after the juror is sworn, and before the jury is completed.

NOTE.—The order of challenges having been in some doubt, and the provisions considered somewhat contradictory, the Supreme Court, in the case of *The People vs. Scoggins*, 37 Cal., p. 679, say: "In a criminal action it is the duty of the Clerk, under the direction of the Court (as in a civil action), to prepare separate ballots, containing the names of jurors summoned who have appeared and not been excused, and deposit them in a box, and to draw from the box twelve names, as required by Sec. 159 of the Civil Practice Act" (Sec. 600 of the Code of Civil Procedure; see, also, post in this note). "Thus far the proceeding is the same in criminal and civil actions. In a civil action each party has the whole twelve before exercising his right of peremptory challenge as to any; and if some are excused for cause, the deficiency must be supplied with other names, who may in like manner be examined until there shall be found in the box twelve men whom the Court shall adjudge to be competent and qualified jurors, and thereupon each may exercise his right of peremptory challenge; but neither can be required to exercise it prior to this stage of the proceeding. The theory of the law probably is that the right to challenge peremptorily cannot be exercised so judiciously until the panel is filled with competent and qualified jurors, of whom each party is allowed to reject a certain number without assigning any reason therefor. But while this is the rule in civil actions, it is slightly varied in criminal actions by Sec. 341 of the Criminal Practice Act (being Sec. 1068 of this Code). Twelve names must be drawn, as in a civil action, and the defendant may examine the whole twelve before exercising the right of peremptory challenge as to any, and those not challenged or excused must then be sworn to try the issue; after which as many more names as will make up the deficiency must be drawn from the box, when the same process will be repeated until the jury is complete. In a civil action none are to be sworn until the jury is complete, and the peremptory challenge may be made at any time before the jury is sworn to try the issue; but under Sec. 341 (this Sec., 1068 of the Code), in a criminal action, those not challenged or excused must be sworn at the time; and the same process must be repeated until the jury is complete. If, however, the party has omitted to make his challenge before a juror is sworn, "the Court may, for good cause, permit it to be taken after the juror is sworn, and before the jury is completed." After the whole twelve are sworn and the jury is complete, no further challenge is permissi-

ble, even with leave of the Court. This variance between the methods of selecting juries in criminal and civil actions was probably dictated by the supposed necessity of placing the jurors in a criminal action under the control of the Court during the process of forming the jury. Hence the provision in Sec. 341 (this Sec., 1068), that the challenge "must be taken when the juror appears, and before he is sworn, unless for good cause the Court shall permit it to be taken after he is sworn, and before the jury is completed." * * *

"In order to avoid all misconstruction on this important point of practice we repeat that in a criminal action twelve names must be drawn from the jury box, and the defendant may examine each separately and exhaust his challenges for cause before challenging any one peremptorily. If he should accept, say six, and challenge six, those accepted must then be sworn, and six additional names must be drawn and presented for examination, with which the same process should be repeated, and so continued until the jury is complete."

This opinion was affirmed in the recent case of Taylor, Administrator, vs. West. Pac. R. R. Co., delivered at the October Term of the Supreme Court, in a civil case which it will be profitable to examine in construing this section. As to last sentence of this section, see People vs. Jenks, 24 Cal., p. 11, in support. Without naming the juror or stating the facts coming to his knowledge, a demand or offer to challenge after the twelfth juror is accepted, but not sworn, may be properly refused.—People vs. Rodriguez, 10 Cal., p. 50.

Per-
emptory
challenge,
what. and
how taken.

1069. (§ 342.) A peremptory challenge can be taken by either party, and may be oral. It is an objection to a juror for which no reason need be given, but upon which the Court must exclude him.

NOTE.—Should a Court adopt a rule requiring a defendant to exercise this right, at a particular time, it would conflict with the preceding section, and it would be error to enforce it.—People vs. Jenks, 24 Cal., p. 11. And this may be exercised after the twelve jurors are passed or taken, but before they are sworn to try the action.—People vs. Kohle, 4 Cal., p. 198; People vs. Reynolds, 16 Cal., p. 128.

Number
of per-
emptory
challenges.

1070. If the offense charged be punishable with death, or with imprisonment in the State Prison for life, the defendant is entitled to twenty, and the State to ten peremptory challenges. On a trial for any other offense, the defendant is entitled to ten and the State to five peremptory challenges.

37 Cal 677
45 Cal 323
46 Cal 122

~~State to five peremptory challenges. On a trial for any other offense, the defendant is entitled to five and the State to three peremptory challenges.~~

NOTE.—Stats. 1864, p. 394, Sec. 1.

1071. (§ 344.) A challenge for cause may be taken by either party. It is an objection to a particular juror, and is either:

Definition and kinds of challenge, for cause.

1. General—that the juror is disqualified from serving in any case; or,

2. Particular—that he is disqualified from serving in the action on trial.

✓ 1072. (§ 345.) General causes of challenge are:

General causes of challenge.

1. A conviction for felony;

2. A want of any of the qualifications prescribed by law to render a person a competent juror;

3. Unsoundness of mind, or such defect in the faculties of the mind or organs of the body as renders him incapable of performing the duties of a juror.

1073. Particular causes of challenge are of two kinds:

Particular causes of challenge.

1. For such a bias as, when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this Code as implied bias;

2. For the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party, which is known in this Code as actual bias.

A challenge to a juror for actual bias must be entered on the minutes of the Court, and an application must be made to the Court to have triers appointed. *People v. Renfrow*, 41 Cal. 37.

~~with malice or ill will, does not disqualify a juror, and is not a cause of challenge for either actual or implied bias.~~

NOTE.—Stats. 1868, p. 704, Sec. 1. See note to Sec. 1078, post.

✓ 1072. Where a juror, whose name is on the poll tax list only, is sworn to try the cause, and the defendant receives the juror without objection as to his competency, he cannot be heard, after verdict is rendered, to object that the juror was lacking in this particular. *People v. Sanford*, 43 Cal. 29.

1061.
vid S. 1065.
S. 1077.

X

✓

Ground of
challenge
for actual
bias.

1074. A challenge for implied bias may be taken for all and any of the following causes, and for no other:

1. Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or to the defendant;

2. Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or in his employment on wages;

3. Being a party adverse to the defendant in a civil action, or having complained against or been accused by him in a criminal prosecution;

4. Having served on the Grand Jury which found the indictment, or on a Coroner's jury which inquired into the death of a person whose death is the subject of the indictment;

5. Having served on a trial jury which has tried another person for the offense charged ~~in the same case~~ ~~in the same case~~;

6. Having been one of a jury formerly sworn to try the same ~~indictment~~ and whose verdict was set aside, or which was discharged without a verdict, after the case was submitted to it;

7. Having served as a juror in a civil action brought against the defendant for the act charged as an offense;

8. If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror.

(Subd. 8.) The mere formation of hypothetical opinions as to the guilt or innocence of the prisoner, founded on hearsay or information, and unaccompanied with malice or ill will, is not sufficient to support a challenge for implied bias. *People v. Murphy*, 45 Cal. 137.

IN GENERAL.—A challenge in a criminal case must specify the particular ground of challenge. If for bias, it must state what kind of bias, and the particular cause from which such bias is to be inferred.

People v. Renfrow, 41 Cal. 37; *People v. McGungill*, 41 Cal. 429, *People v. Walsh*, 43 Cal. 447. An unqualified expression of an opinion, even though the opinion itself be of a qualified character, is ground of challenge for implied bias. *People v. Brotherton*, 43 Cal. 530; *People v. Edwards*, 41 Cal. 640. When disallowance of challenge not prejudicial. *People v. McGungill*, 41 Cal. 429.

NOTE.—One of these grounds must be specified in a challenge. It is not sufficient for counsel to say generally that the challenge is interposed for “implied bias.”—People vs. Reynolds, 16 Cal, p. 130; People vs. Hardin, 37 Cal., p. 25; see Sec. 1076, post. Such general challenges as, “for cause,” “for actual bias,” “for implied bias,” etc., will not suffice; they must particularize.—People vs. Dick, 37 Cal., p. 277. Such are not challenges.

Subd. 1.—3 Blackst. Com., p. 363; 3 Whart. Am. Cr. Law, p. 465, Sec. 3016, and notes.

Subd. 2.—Liv. Crim. Code, p. 529, Art. 330, Subd. 2; 3 Whart. Am. Cr. Law, p. 465, Sec. 3016, and notes.

Subd. 3.—Whart. Am. Cr. Law, p. 466, Sec. 3016, and notes.

Subd. 4.—Id. et id.

Subd. 5.—Liv. Crim. Code, p. 529, Art. 330, Subd. 4.

Subd. 6.—Id. et id., Subd. 5.

Subd. 7.—Id. et id.

Subd. 8.—People vs. Cottle, 6 Cal., p. 227; People vs. Williams, 6 Cal., p. 206; People vs. Reynolds, 16 Cal., p. 128; People vs. Williams, 17 Cal., p. 142; People vs. Mahoney, 18 Cal., p. 180; People vs. Symonds, 22 Cal., p. 348.

Subd. 9.—People vs. Turner, 2 Cal., p. 257; People vs. Sanchez, 24 Cal., p. 17. In The People vs. Damon, 13 Wend., p. 351, it was held that “a person whose opinions are such as to preclude him from finding a defendant guilty of an offense punishable with death, is an incompetent juror on the trial of an indictment for an offense subjecting to that punishment. It is not the opinions on the subject of the *religious denomination* to which he belongs which exclude him, but his own opinions; and, therefore, if he entertains them, though he belongs to no religious denomination, he is incompetent to serve as a juror.” See usual and permissible interrogatories on the examination of jurors on their *voir dire*, 3 Whart. Am. Cr. Law, Sec. 3014, and note, pp. 463–465.

1075. (§ 348.) An exemption from service on a jury is not a cause of challenge, but the privilege of the person exempted.

Exemption
not a
ground of
challenge.

NOTE.—The following sections of The Code of Civil Procedure are applicable to qualifications and exemptions of jurors in criminal cases as well:

Sec. 198. A person is competent to act as a juror if he be:

1. A citizen of the United States, an elector of the county, and a resident of the township at least three months before being selected and returned;
2. In possession of his natural faculties *and not decrepit*;
3. Possessed of sufficient knowledge of the language in which the proceedings of the Courts are had;
4. Assessed on the last assessment roll of his county on property belonging to him.

NOTE.—Under this subdivision the juror must be assessed for real or personal property, or both, on the assessment roll.—*People vs. Thompson*, 34 Cal., p. 671.

Sec. 199. A person is not competent to act as a juror:

1. Who does not possess the qualifications prescribed by the preceding section;
2. Who has been convicted of a felony or misdemeanor, involving moral turpitude.

NOTE.—Gamblers were formerly expressly disqualified, but are not now, under this Code.

Sec. 200. A person is exempt from liability to act as a juror if he be:

1. A judicial, civil, or military officer of the United States or of the State of California;
2. A person holding a county office;
3. An attorney and counselor at law;
4. A minister of the gospel, or a priest of any denomination;
5. A teacher in a college, academy, or school;
6. A practicing physician;
7. An officer, keeper, or attendant of an almshouse, hospital, asylum, or other charitable institution;
8. Engaged in the performance of duty as officer or attendant of a County Jail, or the State Prison;
9. Employed on board of a vessel navigating the waters of this State;
10. An express agent, mail carrier, telegraph operator, or keeper of a public ferry or toll gate;
11. An active member of the Fire Department of any city, town, or village in this State, or an exempt member by reason of five years' active service;
12. A superintendent, engineer, or conductor on a railroad.

Sec. 201. A juror cannot be excused by the Court for slight or trivial cause, or for hardship, or inconvenience to his business, but only when material injury or destruction to his property, or that of the public

entrusted to him, is threatened, or when his own health or the sickness, or death of a member of his family

1076. In a challenge for implied bias, one or more causes stated in §1074 must be alleged. In a challenge for actual bias, the cause stated in the second division of §1073 must be alleged; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter to be submitted to such jury, founded upon public rumor, statements in public journals, or common notoriety; provided it appear to the Court, upon declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to. The challenge may be oral, but must be entered in the minutes of the Court or of the phonographic reporter.

Causes of challenge, how stated.

implied bias, 1074 must be stated, the cause 1073 must be oral, Court or of

to be interposed by the juror on the other side takes effect.—People vs. Gatewood, 20 Cal., 6 Cal., 8. Cottle, 6 Cal., 8. The intention of the Court, as it is termed, is for "implied

bias," to the cases mentioned in §1074, ante, in which, when the fact is established, the partiality of the juror is manifest; and to confine within the challenge to the favor, or, as it is here termed, *actual bias*, an objection to the juror proceeding upon the formation or expression of an opinion, or any other ground showing him to be not impartial. And as another object, to define the kind of bias which will justify the triers in excluding the juror to be the existence of a state of mind on the part of the juror in reference to the case or to either party which satisfies the triers, in exercise of a sound discretion, that he cannot try the issue impartially, and without prejudice to the substantial rights of the party challenging. To carry out these views and objects, Sec. 1084, ante, was originally adopted in 1851, in this State, and for similar reasons was reported by the Code Commission of New York in 1849. The Legislature of 1867-8 (see session Acts, p. 704,) again, the more clearly to express this intention, amended the original Sec. 357 (now Sec. 1084), so as to read as here given in the text, and incorporated the same language with regard to a hypothetical opinion into original Section 346—Code Sec. 1073, ante. These Secs. 1073 and 1084, as originally adopted, were declaratory of the rule laid down in *The People vs. Bodine*, 1 Denio, pp. 307, 308, that "a fixed and

absolute opinion may be necessary to sustain a challenge for *principal* cause ('*implied bias*'), but not so when the challenge is for *favor* ('*actual bias*'). In the first species of challenge the result is the conclusion of *law* upon ascertained facts, but in the latter the conclusion is a matter of fact to be found by the triers. No certain rule can be laid down for their guidance." "They are sworn to try whether the juror challenged *stands indifferent* (Gra. Prac., second ed., p. 307; Bac. Abr. Juries, E., 12, notes; 1 Trials Per Pais, p. 205; Anonymous, 1 Salk., p. 152, pl. 1), and this must be determined upon their conscience and discretion, in view of the facts and circumstances in evidence before them." In order to find a juror competent and qualified, the triers must be satisfied, from a careful examination, that he will act with entire impartiality. "They have the right to examine him fully and carefully, and they should exercise this right with freedom." "No invariable rules are prescribed as tests of this character" ("of impartiality"). "The triers must judge by what they can, in the exercise of their office, discover of the *qualities, state of mind, motives, and relations* of the particular juror, and from this knowledge their decision must be formed;" and from it there is no appeal.—People vs. Reynolds, 16 Cal., p. 137.

Exceptions
to chal-
lenge, and
denial
thereof.

X 1077. (§ 350.) The adverse party may except to the challenge in the same manner as to a challenge to the panel, and the same proceedings must be had thereon as are prescribed in Section 1061, except that if the exception be allowed the juror must be excluded. The adverse party may also orally deny the facts alleged as the ground of challenge.

NOTE.—See Secs. 1073, 1068, 1076, ante, and notes.

Challenge,
how tried.

] 1078. If the facts are denied, the challenge must be tried by the Court.

~~2. If it be for actual bias, by triers~~

NOTE.—*Subd. 1.*—Competency of a juror is not determined by himself, but by the Court from his trial.—People vs. Woods, 29 Cal., p. 635. Residing and thereby acquiring a residence, it is not lost by temporary absence. If it is continued on return he is a competent juror.—People vs. Stonecifer, 6 Cal., p. 405.

X 1077. It is no answer to a challenge for implied bias to say that in the mind or thought of the party challenged, the opinion was qualified, though in its form of expression it was unqualified. The admitted fact being that he had unqualifiedly expressed his opinion upon the question of the guilt or innocence of the prisoner, he was thereby in judgment of law incompetent to serve as a juror. People v. Ed.

To be able to sit on a jury without bias—that any opinion he has can be changed by evidence, and a willingness to be governed by the evidence—constitute a good juror, if qualified in other respects.—*People vs. McCauley*, 1 Cal., p. 379. The mere hearing of or reading about a case, and even of a statement of the facts, does not disqualify a person, but it is the formation of a conclusion.—*People vs. Reynolds*, 16 Cal., p. 128. If a person called as a juror has said, “The people ought to take the prisoner out of jail and hang him,” it would be error to allow him to sit on the jury, and the Court would grant a new trial.—*People vs. Plummer*, 9 Cal., p. 298; but see *People vs. Fair*, January Term, 1872. Being a policeman, and having a general bad opinion of people charged with crime, is no valid objection to a person otherwise competent to sit on a jury.—*People vs. Reynolds*, 16 Cal., p. 128. If a disqualified juror is once accepted, the objection cannot be interposed by one who knew the disqualification and did not urge it at the proper time.—*People vs. Stoncifer*, supra, 6 Cal., p. 405. As challenge for implied bias, counsel must allege one or more of the causes so specified.—*People vs. Hardin*, 37 Cal., p. 259; *People vs. Reynolds*, 16 Cal., p. 130. Hearing the purported facts rumored, but conversing with none of the witnesses, and from this forming an opinion, is not a disqualification.—*People vs. Williams*, 17 Cal., p. 142. General impressions of defendant being a bad man, from reading papers, etc., not a disqualification.—*People vs. Mahoney*, 18 Cal., p. 180. Fixed conclusions do, but impressions do not, disqualify.—*People vs. Symonds*, 24 Cal., p. 17. And these conclusions must amount to settled convictions, or they must have been expressed to disqualify a juror.—*People vs. King*; see facts to be found by triers, note to Sec. 1076, ante, and *People vs. Bodine*, there cited. Notwithstanding the views expressed in this case, furnishing a guide to the discretion of the triers upon a challenge to the favor “*actual bias*,” no rule which can be safely enforced has been established in respect to the degree of opinion necessary to sustain a *principal* challenge for “*implied bias*.” The rule remains that the formation or expression of an opinion sustains the challenge for implied bias, and in its practical application Courts have not felt themselves safe in going beyond that simple inquiry. It ought to be borne in mind that it would be a simple absurdity, after the Court has determined the question of *implied bias*, and overruled the challenge, to interpose a challenge for *actual bias*, and ask the triers

to override the finding of the Court by a different finding on the same facts, which is sometimes resorted to. If, however, other evidence can be produced under the latter challenge, it ought to be interposed. See Sec. 1074, ante, for specification of grounds, and note.

Subd. 2.—A challenge for “actual bias” must state against whom, and if against defendant, it must be so stated to avail him.—*People vs. Dick*, 37 Cal., p. 279. Both for the people and the defendant the law favors a jury without bias or any kind of prejudice, and how the triers are to determine a question of actual bias, see *People vs. Ryan*, 5 Cal., p. 347. How the judgment and discretion of triers are to be exercised, with what care and what they may consider in determining the fact, see *People vs. Reynolds*, 16 Cal., p. 128. The preceding note to Subdivision 1 furnishes much to guide the conduct of triers. See, also, note to Sec. 1076, ante.

Triers, how appointed.

Majority may decide

~~1079. (§ 352.) The triers are three impartial persons, not on the jury panel, appointed by the Court. All challenges for actual bias must be tried by three triers thus appointed, a majority of whom may decide.~~

NOTE.—See note to preceding section.

Oath of triers.

~~1080. (§ 353.) The triers must be sworn generally to inquire whether or not the several persons who may be challenged are biased against the challenging party, and to decide the same truly, according to the evidence.~~

NOTE.—See note to Sec. 1076, ante, et seq.

Juror challenged may be examined as a witness

1081. (§ 354.) Upon the trial of a challenge to an individual juror, the juror challenged may be examined as a witness to prove or disprove the challenge, and must answer every question pertinent to the inquiry.

NOTE.—See note to Sec. 1076, ante, and *People vs. Reynolds*, 16 Cal., p. 136. Triers have a right to examine the juror fully and carefully.

Rules of evidence on trial of challenge.

1082. (§ 355.) Other witnesses may also be examined on either side, and the rules of evidence applicable to the trial of other issues govern the admission or exclusion of evidence on the trial of the challenge.

✱ 1079. If an objection is to be made to the appointment of a trier in a criminal case, it must be made at the time, and the grounds of objection brought to the attention of the Court; and if the objection be overruled, an exception must be reserved in the usual mode. *People v. Voll*, 43 Cal. 166.

1083. The Court must allow or disallow the challenge, and its decision must be entered in the minutes of the Court.

Challenge for implied bias, how determined

335

NOTE.—See note to Sec. 1076, ante, and *People vs. Bodine*, there cited.

1084. (§ 357.) On the trial of a challenge for actual bias, when the evidence is concluded the Court must instruct the triers that it is their duty to find the challenge true, if, in their opinion, the evidence warrants the conclusion that the juror has such a bias against the party challenging him as to render him not impartial; and that if, from the evidence, they believe him free from such bias, they must find the challenge not true; that a hypothetical opinion, unaccompanied with malice or ill will, founded on hearsay or information supposed to be true, is of itself no evidence of bias sufficient to disqualify the juror. The Court can give no other instruction.

Instructions to triers on trial of challenge for actual bias.

NOTE.—See notes to Secs. 1074–1076, ante. Actual bias is that cause stated in the second subd. of Sec. 1073, ante, and referred to in Sec. 1076, ante. The difference between the two forms of challenge for *implied* and *actual* bias is that the *former* is based upon the allegation of a fact which carries with it evident marks either of malice or *favor*, and is sufficient of itself to exclude the juror, without leaving anything to the discretion of the triers or of the Court; while the latter, though of the same nature, is of inferior degree, and is to be resorted to only when, though the juror is not so palpably partial as to give cause for a challenge for implied bias or principal challenge, yet there are grounds to suspect that he will act under some undue influence or bias, in which case the triers, in the exercise of a sound discretion, may reject him. In this trial it is competent to prove intimacy of the challenged juror and the opposite party; that they are members of the same society, partners in business, and the like; also, the feelings of the juror—whether they amount to positive partiality, or ill will, or not; whether his views and opinions are mature, absolute, or *hypothetical*. Indeed, every circumstance or fact from which bias,

partiality, or prejudice may be inferred, although weak in degree, may be thoroughly inquired into. The inquiry should by no means be limited to the isolated question of a fixed and absolute opinion of the guilt or innocence of the prisoner.—People vs. Bodine, 1 Denio, p. 307; People vs. Honeyman, 3 id., p. 124.

Verdict of
trier, and
its effect.

~~1085. (§ 358.) The triers must thereupon find the challenge either true or not true, and their decision is final. If they find it true, the juror must be excluded.~~

NOTE.—See notes to Secs. 1074, 1076, 1084, ante.

Challenges,
first by the
defendant
and then by
the people.

1086. (§ 359.) All challenges to an individual juror, except a peremptory, must be taken, first by the defendant, and then by the people, and each party must exhaust all his challenges before the other begins.

NOTE.—See People vs. Scoggins, 37 Cal., p. 676, et seq.

Order of
challenges.

1087. (§ 360.) The challenges of either party for cause need not all be taken at once, but they must be taken separately, in the following order, including in each challenge all the causes of challenge belonging to the same class:

1. To the panel;
2. To an individual juror, for a general disqualification;
3. To an individual juror, for an implied bias;
4. To an individual juror, for an actual bias.

NOTE.—See People vs. Scoggins, 37 Cal., p. 676; Taylor, Adm'r, vs. West. Pac. R. R. Co., Oct. Term, 1872.

Per-
emptory
challenges
may be
taken after
challenges
for cause
on both
sides are
exhausted.

1088. (§ 361.) If all challenges on both sides are disallowed, either party, first the people and then the defendant, may take a peremptory challenge, unless the parties' peremptory challenges are exhausted.

NOTE.—See People vs. Scoggins, 37 Cal., p. 676, et seq.

CHAPTER II.

THE TRIAL.

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1129. When defendant on bail appears for trial he may be committed.

1130. If District Attorney fails to attend, Court may appoint.

Order of
trial.

*People v. No. 10049.
Mortimer.*

1093. The jury having been impaneled and sworn the trial must proceed in the following order, unless otherwise directed by the Court:

1. If the indictment be for felony, the Clerk must read it, and state the plea of the defendant to the jury. And in cases where the indictment charges a previous conviction, and the defendant has confessed the same, the Clerk, in reading such indictment, shall omit therefrom all that relates to such previous conviction. In all other cases this formality may be dispensed with;

2. The District Attorney, or other counsel for the people, must open the cause and offer the evidence in support of the indictment;

3. The defendant, or his counsel, may then open the defense, and offer his evidence in support thereof;

*District Attorney may conclude arguments.
People v. Mortimer.*

4. The parties may then respectively offer rebutting testimony only, unless the Court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;

5. When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the District Attorney, or other counsel for the people, and counsel for the defendant, may argue the case to the Court and jury; the District Attorney, or other counsel for the people, opening the argument, and having the right to close;

6. The Judge may then charge the jury, and must do so on any points pertinent to the issue, if requested by either party; and he may state the testimony and declare the law. If the charge be not given in writing, it must be taken down by the phonographic reporter.

(Subd. 5.) Order of arguments of counsel. People v. Fair, 43 Cal.

37. Discretion of Court as to who to open. Id. Where two counsel on each side argue the case, they must speak alternately; and, if the

NOTE.—Stats. 1855, p. 275. Removal of place of trial a matter over which the Court exercises a large discretion. If the Court *be satisfied of the fact* that the defendant cannot have a fair trial in the county, a change of venue should be granted.—People vs. Congleton, July Term, 1872 (No. 3382.) There is no limitation of time within which one who commits a murder, whether in the first or any less degree, must be prosecuted. It was not intended by graduating the punishment to change the offense against which the Statute of Limitation did not run.—People vs. Haun, July Term, 1872 (No. 3397.)

Subd. 1.—Prisoner must be present the entire time which the trial of a felony consumes. Reading a deposition to the jury in the absence of the defendant, either before or after retiring, is error for which a new trial will be granted.—People vs. Kohler, 5 Cal., p. 72. Though the requirements of the Code providing the mode of trial in criminal cases should appear wholly immaterial, they ought, in justice to the defendant, to be complied with; a failure so to do subjects the people to the probability of a new trial. This view is sustained in *The People vs. Arnold*, 15 Cal., p. 476.

Subd. 2.—This opening is a simple statement of the theory of the case and the circumstances attending it, as understood by the prosecution, under the discretion of the Court, and without argument or elaboration, and the introduction of the proofs deemed necessary to support the allegations of the indictment. See *People vs. Williams*, Oct. Term, 1872, given in Subd. 5, post.

Subd. 3.—This is the same on the part of the defense that is indicated in the note *supra* for the people—giving the theory of the defense and the proofs supporting such theory or negating the direct proofs of the people; and may consist in stating any defense adopted in the plea and the grounds thereof.—See *People vs. Williams*, Oct. Term, 1872, and cases cited in note to Subd. 5, post.

Subd. 4.—As examples of cases wherein the Court should allow the introduction of other testimony: 1. When surprised by the introduction of witnesses other than those indorsed on the indictment; and 2. When the Court strikes out testimony already given upon which the defense relied.—*People vs. Freeland*, 6 Cal., p. 96; *People vs. Bealoba*, 17 Cal., p. 389. Rebutting testimony.—See *People vs. Kelly*, 28 Cal., p. 423; *People vs. Henderson*, 28 id., p. 465. See, also, cases cited in note to Sec. 1102, post.

Subd. 5.—Courts may limit counsel to a proper and

And the consent of the defendant cannot be presumed from his presence and failure to make objections when the oral instruction is given. *People v. Sanford*, 43 Cal. 29; *People v. Max*, 45 Cal. 186. A written charge may be waived. *People v. Bumberger*, 45 Cal. 650. The Court may, by the express consent of the defendant, or by the mutual consent of the parties, charge the jury orally. *People v. Kearney*, 43 Cal. 383. An entry in the minutes of the Court that "the Court charge the jury orally" (a written charge being expressly waived), must be construed as a "mutual consent to an oral charge. Id.

People v. Woody, 45 Cal. 538. *People v. Rodundo*, 44 Cal. 538.

reasonable consumption of time in presenting cases to juries. This discretion, which is necessarily large, should be carefully, if at all, exercised in capital cases, and only then under extraordinary circumstances.—*People vs. Keenan*, 13 Cal., p. 581. Such limitation of time must in no case deprive the defendant of an opportunity to present his full defense.—Id. It is error to disallow the reading of law to the jury by counsel in the way of illustration, when it is so stated, and in deference to the instructions of the Court as to what the law is.—*People vs. Anderson*, July Term, 1872 (No. 2655). The Court correctly refused to allow the prisoner's counsel to make his argument upon the case made by the prosecution, in opening the case of the prisoner. The argument is to be made when the evidence is concluded.—*People vs. Williams* (No. 2883), April Term, 1872, Sup. Ct. Cal.

Subd. 6.—It is proper to preface this note by stating that prior to 1855 this subdivision read: "The Court shall then charge the jury, if requested by either party." May 7th, 1855, it was amended by inserting the words "in writing," in the sentence. It is here allowed to be orally given, by mutual consent. The Judge, under this section, "may state the testimony" to the jury; and this may be done at their request on returning into Court for that purpose.—*People vs. Ybarra*, 17 Cal., p. 169. And when it is done, it is presumed to have been done properly in the absence of any showing to the contrary. To "state the testimony" is a constitutional provision.—Const., Art. VI, Sec. 17. But to do more, such as to state that "if the evidence of one of the witnesses was true, the defendants were guilty of the offense charged," as was done in *People vs. Ah Fung, et al.*, 16 Cal., p. 137, is error; and it was so held in the case of *Ybarra*, supra, by the Court in commenting on that case, where it appears to have been admitted that there was no controversy on the point.—See instructions in murder case, *People vs. Williams*, Oct. Term, 1872, on capacity to deliberate. It is not such irregularity as to authorize a new trial for a Judge, other than the one who tried the case, by consent to charge the jury and receive the verdict.—*People vs. Henderson*, 28 Cal., p. 471. Nor is it such error for the Judge of the district to resume his seat and pass upon a motion without objection.—Id. The presumption is always that the Judge's charge is in writing, unless the contrary appears.—*People vs. Shuler*, 28 Cal., p. 496; *People vs. Chung Kit*, 17 Cal., p. 322; *People vs. Garcia*, 25 Cal., p. 531. Contradictory

instructions not tolerated.—People vs. Valencia, Oct. Term, 1872 (No. 3131). That the Court may not charge the jury orally, without express consent of the defendant, is settled by a uniform series of decisions, as well as by this section.—People vs. Sandford, January Term, 1872; People vs. Kearney, April Term, 1872. An instruction that “circumstantial evidence should be such as to produce *nearly* the same degree of certainty as that which arises from direct testimony.”—People vs. Cronin, 34 Cal., p. 201; People vs. Padilla, January Term, 1872 (No. 3011); and People vs. Murray, 14 Cal., p. 159. In the Padilla case, *supra*, the Court say: “The true medium is that the evidence shall satisfy the jury to a moral certainty, and beyond a reasonable doubt—that they shall be entirely satisfied—of the guilt of the accused.” The following is erroneous: “If the defendant, having charge of the house, had reason to believe that the person trying to enter the house by the window, at the midnight hour, did so for the purpose of committing a felony, *or other unlawful act*, then the jury will acquit.”—See Sec. 197, ante (§ 29), et al.; People vs. Walsh, April Term, 1872 (No. 2912).

ORAL INSTRUCTIONS.—For fifteen years, and in all the cases of People vs. Beder, 6 Cal., p. 246; People vs. Pagar, 8 Cal., p. 423; People vs. Ah Fong, 12 Cal., p. 345; People vs. Shaw, 26 Cal., p. 78; People vs. Trim, 37 Cal., p. 274, it has been held, “that cases are numerous and uniform to the point, that the giving of an oral charge or instruction to the jury in a criminal case, without the consent of the defendant, is error, and that his consent cannot be presumed from his presence and failure to make the objection when the oral instruction is given.” In fact, in one case Judge Baldwin said an oral instruction is *per se* error, and an offer to reduce it to writing afterwards would not cure it.—People vs. Sandford, January Term, 1872 (No. 2916). To same point.—People vs. Kearney, April Term, 1872 (No. 2123); People vs. Prospero, July Term, 1872 (No. 3392). These decisions were all under the amendment of May, 7th, 1855, which is here changed again.

1094. (§ 363.) When the state of the pleadings requires it, or in any other case, for good reasons, and in the sound discretion of the Court, the order prescribed in the last section may be departed from.

When order of trial may be departed from.

NOTE.—Stats. 1854, p. 81, Sec. 4. See note to Sec. 1095, post. The first *proof* of the Penal Code prepared

by the Commission gave the close of the argument to the defense. This gave rise to opposition and discussion, one of the Commission favoring the section as it here stands, with a section requiring the "law officer" of the people, the District Attorney, in "*propria persona*," to close, in all cases where there was *paid* counsel assisting the prosecution; but since the control of this matter of *opening* and *closing* was within the sound discretion of the Court in all cases, it was finally concluded to leave the statute in this respect unchanged, believing that in all proper cases this power of the Court would be exercised, and not left a dead letter. Encouragement for this hope is founded in the case of *The People vs. Butler*, 8 Cal., p. 435, where Burnett, J. (Field, J., concurring), holds the following language: "The State never asks anything but justice. On the part of the State the prosecution is but a fair and just inquiry into the guilt or innocence of the accused. She can have no interest in convicting the innocent or in releasing the guilty. She stands perfectly impartial as between the community and the individual. Prosecuting attorneys should, therefore, do their duty faithfully, but no more. They should never act as employed counsel. No advantage should be taken of temporary public excitement against the prisoner, or of any prejudice against him arising from any cause whatever. And if such attempts are made, the Court before whom the prisoner is tried should put a stop to them."

Number of
counsel
who may
argue the
case to the
jury.

1095. (§ 364.) If the indictment is for an offense punishable with death, two counsel on each side may argue the cause to the jury. If it is for any other offense, the Court may, in its discretion, restrict the argument to one counsel on each side.

NOTE.—This section, before the adoption of the Codes, after the word "jury," at end of first sentence, read as follows: "in which case they must do so alternately." The recent famous case of *Laura D. Fair*, on the construction of this original section, as also upon other points, was appealed to the Supreme Court, and the Court, in an able and elaborate opinion, decided, at the October Term, 1872, that the beginning of the argument must be determined under the two preceding sections, and that "by whomsoever begun it should proceed by alternation between the counsel engaged," and concluding also, that *one* side should open and the *other* close the argument. It was also determined under the

language of this original section left undisturbed, that when demanded by the defense, two counsel should be heard in capital cases, and that in such case they must present their arguments alternately, so that in all cases the *one* should open and the *other* side close. It will be observed that by the omission of the latter portion of the first sentence, *supra*, the order of argument is subject to the discretion of the Court under Sec. 1094, *ante*.

1096. (§ 365.) A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal.

Defendant presumed innocent until the contrary is proved. Reasonable doubt.

NOTE.—See “Presumption,” note to Sec. 1102, *post*, and Whar. Am. Cr. Law, Sec. 707, *et seq*.

BENEFIT OF DOUBT.—The defendant is entitled to benefit of any reasonable doubt, whether a fact is shown against him, while preponderance of evidence is sufficient to prove a fact in his favor.—*People vs. Milgate*, 5 Cal., p. 127. “The hypothesis contended for by the prosecution must be established to an absolute moral certainty, to the entire exclusion of any rational probability of any other hypothesis being true, or the jury must find the defendant not guilty.”—*People vs. Strong*, 30 Cal., p. 154. Mr. Justice Shaw’s definition of reasonable doubt is: “It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge, * * * a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it.”—*Com. vs. Webster*, 5 Cush., p. 320; indorsed in *People vs. Ashe*, July Term, 1872 (No. 3413), and many other California cases. Rule of reasonable doubt is that as against the defendant facts must be proved beyond a reasonable doubt. In his favor preponderating proof only is necessary.—*People vs. Milgate*, 5 Cal., p. 127; the charge of Chief Justice Shaw, *supra*, in the famous Webster case, approved in *People vs. Strong*, 30 Cal., p. 151; *People vs. Lachanais*, 32 Cal., p. 433.

1096: Defendant entitled to benefit of doubt. *People v. Moody*, 45 Cal. 289. Reasonable doubt, what is. *People v. Ashe*, 44 Cal. 288.

1097. (§ 366.) When it appears that the defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more

When reasonable doubt as to degree, he can be convicted only of lowest.

degrees he is guilty, he can be convicted of the lowest of such degrees only.

NOTE.—People vs. Gilmore, 4 Cal., p. 376; People vs. Backus, 5 Cal., p. 278; People vs. Apgar, 35 id., p. 891; People vs. Marsh, 6 Cal., p. 543; People vs. McNealy, 17 Cal., p. 332; and see note to Sec. 1016, ante, Subd. 3, where these cases are cited. *Two offenses.*—No conviction can be had under an indictment which charges two offenses, if demurred to. Burglary and housebreaking in the day-time are, and were intended to be, two offenses.—People vs. Tackett, Jan. Term, 1872 (No. 3140).

Separate trials.

1098. (§ 367.) When two or more defendants are jointly indicted for a felony, any defendant requiring it must be tried separately. In other cases the defendants jointly indicted may be tried separately or jointly, in the discretion of the Court.

NOTE.—Defendants jointly indicted may be tried separately.—People vs. McCalla, 8 Cal., p. 301. And for this purpose the plea of “not guilty” is a separate plea.—See note to Sec. 1016, ante. Electing to be tried separately, and being so tried, one is a witness for the other.—People vs. Labra, 5 Cal., p. 183.

Discharging one of several defendants before verdict, that he may be a witness.

1099. (§ 368.) When two or more persons are included in the same indictment, the Court may, at any time before the defendants have gone into their defense, on the application of the District Attorney, direct any defendant to be discharged from the indictment, that he may be a witness for the people.

NOTE.—People vs. Bruzzo, 24 Cal., p. 41. A codefendant is a competent witness on the trial of another, notwithstanding the objection of the defendant, and may testify to any facts in his knowledge, whether they tend to criminate himself or not. He must be informed by the Court that he need not make any statement which would criminate himself. Whether he does so or not is his own business.—People vs. Rodundo, Oct. Term, 1872 (No. 3369).

Same.

1100. (§ 369.) When two or more persons are included in the same indictment, and the Court is of opinion that in regard to a particular defendant there

is not sufficient evidence to put him on his defense, it must order him to be discharged from the indictment before the evidence is closed, that he may be a witness for his codefendant.

NOTE.—When tried separately, each may testify for the other.—*People vs. Newberry*, 20 Cal., p. 430. A separate trial may in all cases be had under Sec. 1098, ante, and when so tried, each is a witness for the other. *People vs. Labra*, 5 Cal., p. 183.

1101. (§ 370.) The order mentioned in the last two sections is an acquittal of the defendant discharged, and is a bar to another prosecution for the same offense. Effect of such discharge.

NOTE.—*People vs. Bruzzo*, 24 Cal., p. 41.

1102. The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this Code. Rules of evidence in civil applicable to criminal cases, except, etc.

NOTE.—See Code of Civil Procedure, Part IV, "Of evidence;" "Definition of terms," Sec. 7, ante; "Construction," Sec. 4, ante; and Political Code, Part V, "Definition and sources of law, and effect of the

1102. CHARACTER.—Accused persons entitled to presumptions of character of ordinary fairness. *People v. Fair*, 43 Cal. 137. Evidence of character when admissible. *People v. Edwards*, 41 Cal. 640. On the trial for larceny if the defendant introduces testimony tending to show his good character, the jury cannot disregard this testimony but must take it into consideration with the testimony tending to establish his guilt. *People v. Raina*, 45 Cal. 289. Proof of good character a fact for the jury. *People v. Ashe*, 44 Cal. 288. CONFESSIONS AND DECLARATIONS.—*People v. Johnson*, 41 Cal. 452. Presumptions as to subsequent confessions. *Id.* REPUTATION.—It is competent to prove by reputation the existence of a corporation. *People v. Ah Sam*, 41 Cal. 645.

OF EVIDENCE.—(Code Civ. Pro., Sec. 2061.) Content must be united.—Sec. 20, ante. Defendant may be a witness in his own behalf.—Code Sec. 1879, and note. This modifies the rule that the intent of the accused is to be inferred from his language, since he may, by being a witness in his own behalf, explain what he meant.—*People vs. Anderson*, 39 Cal., p. 576. It was error to rule out a defendant's testimony on the ground that the defendant could best explain himself on that subject, "the defendant was not bound to offer himself to prove any fact in the case; no presumption can be properly indulged in against him for not doing so."—*People vs. Anderson*, 39 Cal. 704. It is not a valid objection to the examination of a witness that his name is not indorsed on the indictment. *People vs. Bonney*, 19 Cal., p. 426; *vs. Symonds*, 22 Cal., p. 348. See, also, *People vs. Lyn*, 29 id., p. 562. Any witness may be exam-

ined, but if his name is not indorsed on the indictment and his introduction is a surprise, it may, on a proper showing, be ground for postponement for surprise.—People vs. Freeland, 6 Cal., p. 96. The venue or *locus delicti* must in all cases be shown to warrant a conviction.—People vs. Parks, July Term, 1872 (No. 3338). If no *corpus delicto* is shown, there can be no conviction of the offense.—People vs. Jones, 31 Cal., p. 565; People vs. Long, January Term, 1872 (No. 3154).

WITNESSES, AND THEIR COMPETENCY.—A party may show a want of competency by examining him on his *voir dire*, or prove it by other competent testimony. See People vs. Anderson, 26 Cal., p. 129, where the rules of such examination are fully stated; see, also, Co. Civ. Pro., Secs. 1878–1881, and notes; see on the subject of testimony of blacks and Chinese, People vs. Howard, 17 Cal., p. 63; People vs. Awa, 27 Cal., p. 638; People vs. George Washington, 36 Cal., p. 658; and People vs. Brady, 40 Cal., p. 207. A witness may testify falsely, and do so innocently, or by mistake, in which case the rule that “if false in one particular false in all” does not apply. It applies only when he does so willfully.—People vs. Strong, 30 Cal., p. 151. When there are circumstances of complicity between the prisoner and his wife, her exclamations at the time of the killing are testimony if in the presence or hearing of the prisoner.—People vs. Murphy, April Term, 1872 (No. 3113); see, also, same case and same ruling, 39 Cal., p. 56. The *defendant* may *testify* on his *trial*, but not in a preliminary examination (under the statute of April 2, 1866). A statement made before the committing magistrate is not authorized to be under oath, but it must be in writing. If it is given under oath, it is error to allow his statements thus made to be used or given in proof on his trial.—People vs. Gibbons, April Term, 1872 (No. 3274). Since by the rules of evidence (Part IV, Sec. 1879, Co. Civ. Pro.) all persons are witnesses, there is no reason why a defendant may not be a witness on his examination, as well as on the trial. Prisoner may be asked in cross-examination a question, though his answer will not be the best evidence in degree.—People vs. Snellie, April Term, 1872, (No. 2959). A *witness*, though *not* an *expert*, may give his opinion or impression of the mental condition of one dying from a mortal wound received at the hands of the defendant.—People vs. Sandford, January Term, 1872 (No. 2916). “It approaches knowledge, and is knowledge, so far as the imperfection of human nature will permit.”—Judge Gaston, & Iredell, p. 78.

Dying declarations (*id.*) admitted, though deceased had no religious belief. Const., Art. I, Sec. 4, abrogates the common law rule.

IMPEACHMENT OF WITNESS.—How far cross-examination may be extended for that purpose, and in what it may consist.—*People vs. Donovan*, April Term, 1872 (No. 3221). A proper foundation is laid to impeach the credibility of a witness by calling attention to the time, place, and parties, and to the testimony given previously by witness before a Coroner. The testimony as taken down and signed by witness at the Coroner's inquest may be introduced to impeach the witness, when taken as directed by statute.—*People vs. Devine*, October Term, 1872. To discredit a witness by a conviction, it is not the best evidence in degree to ask him whether or not he was so convicted; the record is the best evidence, and must be produced, when such proof is permissible.—*People vs. McDonald*, 39 Cal., p. 697; also, *People vs. Rinehart*, *id.*, p. 449. In each of these cases the defendant was his own witness. So, also, in *Clark vs. Reese*, 35 Cal., p. 96. A party as a witness drops the character of party and assumes that of witness, and cannot be forced to answer questions which tend to degrade his character.—1 *Greenleaf Ev.*, Sec. 457; 2 *Phil. Cr. C. E. & H.*, notes, p. 939; *Newcomb vs. Griswold*, 24 N. Y., p. 298. It is not error to allow witness to use "plan" of a house to illustrate his evidence; it would have been better to have first proved the plan, but not being offered as evidence it was not necessary.—*People vs. Murphy*, 39 Cal., p. 56. Privileged communications.—See *People vs. Atkinson*, 40 Cal., p. 285; *Whar. Am. Cr. Law*, Sec. 773. How character of witness may be attacked.—See 1 *Whar. Am. Cr. Law*, Secs. 814–816. And how contradicted or sustained.—*Id.*, Secs. 817–821. How to impeach a witness on statements made out of Court.—See *People vs. Garnett*, 29 Cal., p. 622.

WITNESSES EXCLUDED.—In general the Court will, on the application of either of the parties, direct that all the witnesses but the one under examination shall leave the Court.—*Roscoe's Cr. Ev.*, p. 162; *People vs. Duffy*, 1 *Wheeler's C. C.*, p. 123. And the right of either party to require the unexamined witness to retire, may be exercised at any period of the case.—*Id.* What is sometimes called placing witnesses under the rule, is to call them all to the bar of the Court, swearing them, and then giving them the charge not to remain in Court while any one is being examined, under penalty of contempt. Witnesses may be excluded while one is being

examined, on motion, in the sound discretion of the Court.—People vs. Garnett, 29 Cal., p. 622; see Sec. 867, ante. Should a witness be present, in disobedience to the order excluding him, it is no ground for rejecting him as a witness; he is, however, thereby in contempt of Court.—People vs. Bosovitch, 20 Cal., p. 436. Prosecution cannot be compelled to introduce particular witnesses.—People vs. Jim Ti, 32 Cal., p. 60. A defendant ought not to be deprived of the personal presence at the trial of a witness which may be had.—People vs. Dodge, 28 Cal., p. 445.

EXCLUDING STATEMENTS.—Statements made by the wounded party three or four days after receiving the wound not being part of the *res gestæ* nor *dying declarations*, were properly excluded.—People vs. McLaughlin, October Term, 1872 (No. 1005); Com. vs. Densmore, 12 Allen, p. 587 (Mass.); Com. vs. Hackett, 2 id., p. 136; Rosc. Crim. Ev., p. 26; Stark Ev. (Am. ed.), p. 45; 1 Grenl. Ev., Sec. 109. Statements of the injured party tending to show innocence of the prisoner are excluded properly.—People vs. McCrea, 32 Cal., p. 100.

DISABILITY OF WITNESS.—A pardon which does not extend to the offense, but simply to the offender, does not give one convicted of an infamous crime the right to be believed under oath.—People vs. Bowen, April Term, 1872 (No. 2023.)

EVIDENCE ON FORMER TRIAL MAY BE USED ON SECOND, WHEN.—That which a witness testified to on the former trial of the same case, and between the same parties, if since deceased, may be given in evidence on a second trial. The rule is the same in civil and criminal cases.—People vs. Murphy, April Term, 1872 (No. 3113); same case, 39 Cal., p. 56. The minutes of such testimony, made at the time, may be read in evidence, and in the case of Metis vs. O'Hara, 4 Binn., p. 110; approved in Cornell vs. Green, 10 S. & R., p. 17, the recollection of the witness, by the aid of such notes, was received. Recent cases relax the old rule that the precise language must be used.—Id. See Secs. 2042-2054, Code Civil Procedure.

GENERAL RULES for the examination of witnesses, direct and cross-examination defined.—Id., Sec. 2045. Direct evidence for the prosecution. In all prosecutions two facts are to be proved: 1. The commission of an offense. 2. That the defendant committed it.—People vs. Jones, 31 Cal., p. 565. Unless an offense is proved no one is or can be guilty of the charge, and in such case it is not error for the Court to instruct an acquittal.—Id

The intent must invariably appear when an unlawful act is established. The law presumes an unlawful intent primarily, and the defense must show justification or other excuse.—People vs. Harris, 29 Cal., p. 678. Another offense than the one charged may not be proved, nor may evidence thereof be given, except as to conviction of former offense in connection with the second offense as permitted in this Code, ante, Secs. 666, 667.—See People vs. Jones, 31 Cal., p. 565. And if, in defendant's examination, he is asked regarding such other offense, he answers negatively, he cannot be contradicted *aliunde*.—Id. Depositions taken before commitment, or otherwise than as specially provided by the Code, cannot be used against a defendant.—People vs. Garrett, 6 Cal., p. 203. There may now be used before the Grand Jury, by Secs. 686–919, ante, depositions taken on an examination. In The People vs. Williams, 18 Cal., p. 187, the Court suggested that where evidence is offered on the part of the defendant which is of doubtful inadmissibility, it would be better to admit it than chance a reversal on an adverse ruling. Objections to admissibility ought to specify the ground of the objection.—People vs. Frank, 28 Cal., p. 507. Confessions or admissions ought to be very carefully considered before they are permitted to be proved as evidence of guilt. They are defined in People vs. Strong, 30 Cal., p. 151. Corroboration of confession may be shown.—People vs. Jones, 32 Cal., p. 80. They must be freely made at the time.—People vs. Jim Ti, id., p. 60. But if they are not objected to as evidence when offered, on the ground that they were not made freely, the defendant must show duress, fear, compulsion, or the like, to avoid it.—People vs. Rodriguez, 10 Cal., p. 50. The admissions or statements cannot be shown by memoranda made at the time, though the witness who made them says they are correct.—People vs. Elyea, 14 Cal., p. 144. It may be said to be a *rule* that a confession alone will not sufficiently prove the commission of a crime, if the crime is proved *aliunde*, or corroborating circumstances are shown, then the confession of the person who committed it is sufficient.—People vs. Jones, 31 Cal., p. 565. The admissibility of confessions must be passed upon by the Court, and it is the correct method for the Court to hear proof on this subject and determine the fact without the hearing of the jury before it is given, if objection is made.—People vs. Ah How, 34 Cal., p. 218. Fear or coercion does not exclude confessions as to where stolen property is concealed, etc.—People vs.

Ah Ki, 20 Cal., p. 177. When these *indicia of guilt* are implied by acquiescence (People vs. McCrea, 32 Cal., p. 98), they are admissible as guilty *conduct* rather than *confessions* of guilt.—Id. Counsel may admit facts with consent express or implied by defendant in the course of the trial, which will be admitted as evidence.—People vs. Garcia, 25 Cal., p. 531. Statements by the defendant while asleep not evidence.—People vs. Robinson, 19 Cal., p. 40. It is error to exclude statements of the District Attorney which have a material bearing for the defense, made under circumstances of peculiar relevancy to the case, and the credibility of his own witness.—People vs. Robles, 34 Cal., p. 591.

DECLARATIONS OF ONE IN EXTREMIS, OR IN ARTICULO MORTIS.—When made by the victim are evidence on the trial for murder.—People vs. Glenn, 10 Cal., p. 32. Consult on the question of admissibility.—People vs. Lee, 17 Cal., p. 76; People vs. Sanchez, 24 Cal., p. 17; People vs. Carkuff, id., p. 640; People vs. Ybarra, 18 Cal., p. 166; People vs. Lawrence, 21 Cal., p. 368. It appears from these cases that, in the language of Lord Chief Baron Eyre, in Rex vs. Woodcock, 2 Leach's Cr. Cas., pp. 267, 566, "That they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced, by the most powerful considerations, to speak the truth. A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath in a Court of justice," is to be found the reason as well as the rule of the law.—Given in 1 Greenleaf Ev., Sec. 158. That they must be made "under a *sense of impending death*," which sense may be proved by any of the ordinary available means of proof, directly by witnesses, or otherwise, from controlling circumstances. (It is, however, always to be received with the greatest caution.)

DEPOSITIONS AS EVIDENCE.—See Sec. 1345, and note; also, Secs. 1349–1362, post, and note, may be taken out of the State. The case of People vs. Francis, 38 Cal., p. 183, is superseded by the latter sections referred to.

DEFENDANT'S CHARACTER, for peace and quiet, in murder trials, is always involved; and evidence that his character in this respect is good may be given.—People vs. Stuart, 28 Cal., p. 395. Evidence on this subject must not be as to a particular fact, but with

reference to the whole case then being tried.—*People vs. Milgate*, 5 Cal., p. 127. And it ought to be confined to cases where doubt exist.—*People vs. Roberts*, 6 Cal., p. 214; 1 Whart. Am. Cr. Law, Secs. 636-7, and 824, and notes, where the permission of this character of evidence is warmly supported and fully discussed. In continental Europe, and under the civil law, it is always resorted to, and here it may be properly done, though its necessity does not so pertinently exist. The prosecution cannot attempt to show bad character; but the defense, in all cases, may show the good character of the defendant. It was held in *People vs. Ashe*, July Term, 1872 (No. 3413), that the evidence of previous good character, when evidence of guilt has rebutted the *legal presumption* that every one is innocent until the contrary appears, may be given and considered by the jury.—2 Russ. on Cr. and Mis., p. 704.

PRESUMPTION OF GUILT from the possession of stolen property is not increased because good character is not shown.—*People vs. Gassaway*, 23 Cal., p. 51. Evidence of bad character of defendant may only be given when good character is attempted to be shown; but when the evidence of the defense simply tends to show good character, or tends to show that the defendant's character had been injured by relations with deceased, it cannot be construed to authorize the prosecution to make a direct assault upon defendant's character; nor is the character of a defendant for chastity involved in the trial of an indictment for murder.—*People vs. Laura D. Fair*, Oct. Term, 1872.

EXAMINATION OF WITNESS BY OPPOSITE PARTY. Hypothetical questions not supported by facts proved are improper.—*People vs. Graham*, 21 Cal., p. 261. Contradictory or confused statements of a witness, or one testifying to facts showing intimate knowledge of all the facts under suspicious circumstances, authorizes the greatest latitude to the cross-examination.—*People vs. Williams*, 18 Cal., p. 187. Disclosing part of a conversation entitles opposite party to all.—*People vs. Strong*, 30 Cal. p. 26. Proof *tending* to prove guilt is as much to be rebutted as any.—*People vs. Kelly*, 28 Cal., p. 423.

CORRECTING AN ERROR—In ruling out testimony and permitting either personal presence of the witness giving it, or his rejected statements, as taken down, to be read, is not error on which a reversal will be had.—*People vs. Henderson*, 28 Cal., p. 465. How far cross-examination may be pursued, where testimony has

taken a wide range, and rebutting and re-direct examinations pursued at length.—See *People vs. Dennis*, 39 Cal., p. 635.

CIRCUMSTANCES AS EVIDENCE.—When relied on to convict, they are “to be” not only “consistent with the prisoner’s guilt, but inconsistent with every other rational conclusion.”—*People vs. Shuler*, 28 Cal., p. 496; 1 Greenleaf’s Ev., Sec. 34. Also, *People vs. Strong*, 30 Cal., p. 151; *People vs. Dick*, 32 Cal., p. 213. In all these cases the rule seems to be as above stated, and though not so conclusive as direct testimony, yet equally entitles the people to a verdict.—*People vs. Cronin*, 34 Cal., p. 191. Because occasionally circumstances alone have failed to point out the perpetrator of crime is not sufficient reason to regard them as invariably insufficient, and juries should be guarded by the Court not to attach more than a due weight to such exceptions.—*Id.* Each link in the chain of identification must be shown “to a moral certainty, or beyond reasonable doubt,” and so must the chain be shown to be which consists of such independent and material facts.—*People vs. Phipps*, 39 Cal., p. 333; 3 Greenleaf Ev., Sec. 30; *Starkie Ev.*, 9th Am., from 4th Lond. ed., p. 856; *Burrell on Circ. Ev.*, p. 733; *Sumner vs. State*, 5 Blackf., p. 579; *Com. v. Webster*, 5 Cush., p. 313, et seq.

CONCLUSIONS MUST BE DRAWN FROM THE EVIDENCE. This is the peculiar province of the jury, and it must not be interfered with by the Court; neither prohibited nor aided, by the Court declaring what is *not* and what *is proved*, nor stating that the weight of evidence is in favor or against a given fact. The following cases may be consulted on this point.—*People vs. English*, 30 Cal., p. 214; *People vs. Strong*, id., p. 151; *People vs. Dick*, 32 id., p. 213; *People vs. Ah Fung*, 17 id., p. 377; *People vs. King*, 27 id., p. 507; *People vs. Bagnell*, 31 id., p. 409. And is alike their province to find malice. *People vs. Roberts*, 6 id., p. 214. Identity of property. *People vs. Jim Ti*, 32 Cal., p. 60; also, *People vs. Linn*, 23 id., p. 150. Circumstances producing them, but not the impressions themselves, can be subject of proof.—*People vs. Hurley*, 8 Cal., p. 90. Error, in permitting certain improper evidence to go to the jury, may be cured by striking it out and pointedly instructing the jury to disregard it.—*People vs. Hoy Yen*, 34 Cal., p. 176.

INSANITY.—On the subject of *insanity*, and want of a deliberative mind from intoxication, see *People vs. Williams*, April Term, 1872 (No. 2883,) and the instruc-

tions on the subject there given, approved in *People vs. Roberts*, 6 Cal., p. 217; *People vs. Nichols*, 34 Cal., p. 211; *People vs. Lewis*, 36 Cal., p. 531; *People vs. Belencia*, 21 Cal., p. 544; *People vs. King*, 27 Cal., p. 507; see note to Sec. 1016, ante. *Evidence*, where the plea of *insanity* or *drunkenness* is relied on.—See note to Sec. 1016, ante, plea of not guilty. As to particular cases, see note to Sec. 959, ante.

IN HOMICIDE.—If any *part* is, *all* of a *confession* must be admitted in evidence.—*People vs. Murphy*, 39 Cal., p. 57. Witness being defendant makes no difference.—See, also, *People vs. Navis*, 3 Cal., p. 106. A prior difficulty on the day of the homicide, at which deceased was not present, is inadmissible for the purpose of connecting the two, etc.—*People vs. Stonecifer*, 6 Cal., p. 405. Otherwise, if the Court found the connection to exist.—*Id.*; see, also, *People vs. Smith*, 26 Cal., p. 665.

REPUTATION AND CHARACTER.—See “Character,” supra, in this note. That of the deceased must not be permitted to be shown except, perhaps, in a case where there is doubt about defendant acting in self-defense.—*People vs. Murray*, 10 Cal., p. 309. Reputation, and not character, is the subject of inquiry.—*People vs. Anderson*, 39 Cal., p. 704. The record of the conviction of one standing in the relation of *principal* is *not* evidence for any purpose against one charged with him under circumstances which shows him *accessory*, as these terms formerly were understood. *People vs. Bearss*, 10 id., p. 68. Deeds or other evidence of title to land about the possession of which the homicide occurred, are not evidence.—*People vs. Hohnshell*, id., p. 83; but see *People vs. Castello*, 15 Cal., p. 350, post, in this note.

SELF-DEFENSE.—It may be shown what occurred and was said by deceased to others, when possessing himself of a deadly weapon found near his body after the conflict, though defendant was not present, it being part of the *res gestæ*.—*People vs. Arnold*, 15 Cal., p. 476. See, also, this case and *People vs. Lombard*, 17 Cal., p. 316, on the subject of *threats* as a justification. With regard to acts and words as part of the *res gestæ*, see *People vs. Wyman*, id., p. 70, where it was held that they must be contemporaneous, or so nearly so, with the homicide, as to have a bearing in illustrating its character, etc. Here they were ruled out, but the Supreme Court say the defendant was not injured by the ruling, because he was found guilty of manslaughter only.

Where the homicide occurred when deceased was in the act of disturbing the possession and property of the defendant in a mining claim, it is proper to allow the defendant to show ownership as part of the *res gestæ* indicating the state of defendant's mind at the time.—People vs. Castello, 15 Cal., p. 350.

MALICE is established sometimes by proof that defendant went armed, etc., and similar acts are permitted to be the subject of inquiry. As against this, defendant may in explanation show why he was armed, etc., or the like.—People vs. Williams, 17 Cal., p. 142. Threats as evidence of malice.—People vs. Scoggins, 37 Cal., p. 676. It is proper to show that threats are communicated to defendant which were made by deceased.—People vs. Lombard, 17 Cal., p. 316. Exclusion of declaration when properly made, and no advantage of the surprise is attempted to be taken, is not error.—People vs. Bealoba, 17 Cal., p. 389. When, what, and under what circumstances declarations are inadmissible.—People vs. Simonds, 19 Cal., p. 275. It would be no defense to show that a difficulty had occurred sufficient time prior to the homicide to allow passion to cool; hence, proof of one six hours prior thereto was held to be inadmissible in the case of People vs. Smith, 26 Cal., p. 665.

INTENT is essential, and may be proved directly or by any circumstances tending to establish it.—People vs. Pool, 27 Cal., p. 512. Threats against one other than deceased may not be shown to have been made immediately prior to the homicide, nor will quarrels be permitted to be proved.—People vs. Henderson, 28 Cal., p. 465; People vs. Scoggins, 37 Cal., p. 677. Shooting one person with the intent to kill another, the shooting is with murderous intent.—People vs. Torres, 38 Cal., p. 141.

IN LARCENY.—Identity of the goods and owner as laid in the indictment, if not proved, fatal; but in this case it was sufficiently proved.—People vs. Teresa Keane, April Term, 1872 (No. 3194). Intent may be explained.—People vs. Stone, 16 Cal., p. 369. Identity of property and reasonable doubt of.—People vs. Eckert, 19 Cal., p. 603. Unexplained possession of stolen goods not of itself sufficient to convict.—People vs. Ah Ki, 20 Cal., p. 177. Jury to judge of credibility of witness.—People vs. Eckert, *supra*. In charge, the Court must not assume a fact to have been proved.—People vs. Carabin, 14 Cal., p. 438. Legislature may declare grand larceny the larceny of specific property,

STATEMENTS.—The evidence of the committing magistrate, as to the statement made by the prisoner on his preliminary examination, is not admissible on the trial. *People v. Gibbons*, 43 Cal. 557.

PROOF OF "LOCUS DELECTI."—Where the evidence tended to show that the offense charged in the indictment was committed at a certain place; but there was nothing in the record tending to show that the place was situated in the county, there was a failure to prove the *locus delicti*. *People v. Parks*, 44 Cal. 105.

WITNESSES.—The rule that no person is to be held incompetent on account of matters of religious belief applies to dying declarations. *People v. Sanford*, 43 Cal. 29.

ACCESSORY.—One jointly indicted as accessory after the fact, is a competent witness for the people on the trial of the principal. *People v. Rodondo*, 44 Cal. 538.

SHERIFF.—May testify to statements made to him by the accused after arrest, if such statements are made voluntarily, without any threats or promises of reward. *People v. Rodondo*, 44 Cal. 538.

EXPERTS.—A witness, though not an expert, may in connection with a conversation detailed by him state his opinion, belief, or impression as to the state of mind of such person as these seemed to the witness at the time of the conversation. *People v. Sanford*, 43 Cal. 29.

DEFENDANT AS A WITNESS IN HIS OWN BEHALF.—The fact that a defendant offers himself as a witness in his own behalf does not change the rules of practice with reference to the proper limits of cross-examination, and does not make him a witness for the State against himself. *People v. McGungill*, 41 Cal. 429. That the credit to be given to his testimony must be left solely to the jury, under instructions of the Court, does not establish a new rule, but simply applies to defendants a rule which exists as to all other witnesses. *People v. Rodondo*, 44 Cal. 538.

IMPEACHMENT OF WITNESS.—The prosecution may show by other witnesses that a witness for defendant had given a different account of what occurred at the time the offense was committed from that testified by the witness on the stand. *People v. Nyland*, 41 Cal. 129. Where defendant introduces witnesses to impeach the credibility of one of plaintiff's witnesses it is not an abuse of discretion in the Court to limit to eight witnesses, provided the plaintiff introduces no witnesses to sustain the credibility. *People v. Murray*, 41 Cal. 66.

EVIDENCE NECESSARY TO CONVICT.—*People v. Padillia*, 42 Cal. 536, inference of guilt from circumstantial evidence. *People v. Murray*, 41 Cal. 66.

McCrea, 32 Cal., p. 98; *People vs. Jones*, 18 Cal., p. 80.

IN PERJURY.—*People vs. Quin*, 18 Cal., p. 122; *People vs. Webb*, 38 Cal., p. 475, history of case.

IN FORGERY AND COUNTERFEITING.—Proof of corporation *de facto*. Time, and guilty knowledge.—*People vs. Frank*, 28 Cal., p. 507. Having counterfeit coin.—*People vs. Farrell*, 30 Cal., p. 316. Having tools, etc., for counterfeiting.—*People vs. White*, 34 Cal., p. 183.

IN ASSAULT—With intent to commit murder.—See

People vs. English, 30 Cal., p. 214; People vs. Hobson, 17 Cal., p. 424.

IN BURGLARY.—See People vs. Jenkins, 16 Cal., p. 431; People vs. Winters, 29 Cal., p. 658; and Sec. 459, ante, et seq., and notes.

IN ARSON.—See Secs. 447-455, ante, and notes; People vs. Hughes, 29 Cal., p. 257; People vs. Scott, 32 Cal., p. 200.

IN INCEST.—See Sec. 285 and note, ante, and Sec. 785, post; People vs. Murray, 14 Cal., p. 159.

Evidence
on trial for
treason.

1103. (§§ 371, 372.) Upon a trial for treason, the defendant cannot be convicted unless upon the testimony of two witnesses to the same overt act, or upon confession in open Court: nor can evidence be admitted of an overt act not expressly charged in the indictment, nor can the defendant be convicted unless one or more overt acts be expressly alleged therein.

NOTE.—Art. I, Sec. 2, State. Const., and note, Appendix Pol. Code Cal.

Evidence
on trial for
conspiracy.

1104. (§ 373.) Upon a trial for conspiracy, in a case where an overt act is necessary to constitute the offense, the defendant cannot be convicted unless one or more overt acts are expressly alleged in the indictment, nor unless one of the acts alleged is proved; but other overt acts not alleged in the indictment may be given in evidence.

When
burden of
proof
shifts in
trials for
murder.

1105. Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.

NOTE.—Stats. 1850, p. 229, Sec. 37.

Evidence
on a trial
for bigamy.

1106. Upon a trial for bigamy, it is not necessary to prove either of the marriages by the register, certificate, or other record evidence thereof, but the same may be proved by such evidence as is admissible to

prove a marriage in other cases; and when the second marriage took place out of this State, proof of that fact, accompanied with proof of cohabitation thereafter in this State, is sufficient to sustain the charge.

NOTE.—Stats. 1861, p. 415, Sec. 1; see note to Sec. 281, ante.

1107. Upon a trial for forging any bill or note purporting to be the bill or note of an incorporated company or bank, or for passing, or attempting to pass, or having in possession with intent to pass, any such forged bill or note, it is not necessary to prove the incorporation of such bank or company by the charter or act of incorporation, but it may be proved by general reputation; and persons of skill are competent witnesses to prove that such bill or note is forged or counterfeited.

Evidence upon a trial for forging bank bills, etc.

Experts.

NOTE.—Stats. 1850, p. 223, Sec. 79; see Sec. 470, and note, ante.

1108. Upon a trial for procuring or attempting to procure an abortion, or aiding or assisting therein, or for inveigling, enticing, or taking away an unmarried female of previous chaste character, under the age of twenty-five years, for the purpose of prostitution, or aiding or assisting therein, the defendant cannot be convicted upon the testimony of the woman upon or with whom the offense was committed, unless she is corroborated by other evidence.

Evidence upon trial for abortion and seduction.

NOTE.—See People vs. Joselyn, 39 Cal., p. 393; and Sec. 1111, post, and note.

1109. Upon a trial for the violation of any of the provisions of Chapter IX, Title IX, Part I of this Code, it is not necessary to prove the existence of any lottery in which any lottery ticket purports to have been issued, or to prove the actual signing of any such ticket or share, or pretended ticket or share, of any pretended lottery, nor that any lottery ticket, share, or interest was signed or issued by the authority of any manager,

Evidence on a trial for selling, etc., lottery tickets.

- or of any person assuming to have authority as manager; but in all cases proof of the sale, furnishing, bartering, or procuring of any ticket, share, or interest therein, or of any instrument purporting to be a ticket, or part or share of any such ticket, is evidence that such share or interest was signed and issued according to the purport thereof.

NOTE.—Stats. 1861, p. 229, Sec. 12.

Evidence
of false
pretenses.

1110. (§ 376.) Upon a trial for having, with an intent to cheat or defraud another designedly, by any false pretense, obtained the signature of any person to a written instrument, or having obtained from any person any money, personal property, or valuable thing, the defendant cannot be convicted if the false pretense was expressed in language, unaccompanied by a false token or writing, unless the pretense, or some note or memorandum thereof be in writing, subscribed by or in the handwriting of the defendant, or unless the pretense be proven by the testimony of two witnesses, or that of one witness, and corroborating circumstances; but this section shall not apply to a prosecution for falsely representing or personating another, and, in such assumed character, marrying, or receiving any money or property.

NOTE.—Stats. 1862, p. 53, Sec. 1.

Conviction
cannot be
had on
uncor-
roborated
testimony
of
accomplice

1111. (§ 375.) A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof.

NOTE.—Founded upon Sec. 375 of the Criminal Practice Act of 1851, which read as follows:

“Section 375. A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated

See
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Crown

by such other evidence as shall tend to convict the defendant with the commission of the offense; and the corroboration shall not be sufficient, if it merely show the commission of the offense, or the circumstances thereof."

✓ In *The People vs. Ames*, 39 Cal., p. 403, says Justice Crockett, speaking for the Court: "As we construe this provision, the corroborating evidence must of itself, and without the aid of the testimony of the accomplice, tend, in some degree, to connect the defendant with the commission of the offense. * * * The purpose of the statute was to prohibit a conviction, unless there was some evidence, entirely exclusive of that of the accomplice, which of itself, and without the aid of the accomplice, tended to raise at least a suspicion of the guilt of the accused." The following leading cases sustain the view taken by Justice Crockett: *Rex vs. Webb*, 6 C. & P., p. 595; *Rex vs. Wilkes*, 7 C. & P., p. 172; *People vs. Davis*, 21 Wend., p. 313; *People vs. Costello*, 1 Denio, p. 87; *People vs. Echert*, 16 Cal., p. 110. The language of the section is modified so that it may fully accord with the construction placed upon it by the authorities cited.—See, also, *People vs. Garnett*, 29 Cal., p. 622; *People vs. Joselyn*, 39 id., p. 393. "The corroborating evidence may be slight, and entitled to but little consideration, nevertheless the requirements of the statute are fulfilled if there be *any* corroborating evidence which of itself tends to commit the accused with the commission of the offense."—*People vs. Melvane*, 39 Cal., p. 616. Feigned accomplice as witness.—*People vs. Farrell*, 30 Cal., p. 316.

1112. (§§ 379, 380.) If it appears by the testimony that the facts proved constitute an offense of a higher nature than that charged in the indictment, the Court may direct the jury to be discharged, and all proceedings on the indictment to be suspended, and may order the defendant to be committed or continued on, or admitted to bail to answer any indictment which may be found against him for the higher offense. If an indictment for the higher offense is found by a Grand Jury impaneled within a year next thereafter, he must be tried thereon, and a plea of former acquittal to such last found indictment is not

If the evidence show higher offense than the one charged, proceedings to be had thereon.

sustained by the fact of the discharge of the jury on the first indictment.

NOTE.—See *People vs. Webb*, 38 Cal., p. 467. This section was so changed as to obviate the difficulties which seemed to require the rendition of the decision in the case here cited.

Court may discharge jury when it has not jurisdiction, etc.

1113. (§ 381.) The Court may direct the jury to be discharged where it appears that it has not jurisdiction of the offense, or that the facts charged in the indictment do not constitute an offense punishable by law.

Proceedings, if jury discharged for want of jurisdiction of offense committed out of the State.

1114. (§ 382.) If the jury is discharged because the Court has not jurisdiction of the offense charged in the indictment, and it appears that it was committed out of the jurisdiction of this State, the defendant must be discharged.

Proceedings in such case, when offense committed in the State

1115. (§§ 383, 384.) If the offense was committed within the exclusive jurisdiction of another county of this State, the Court must direct the defendant to be committed for such time as it deems reasonable, to await a warrant from the proper county for his arrest; or if the offense is a misdemeanor only, it may admit him to bail in an undertaking, with sufficient securities, that he will, within such time as the Court may appoint, render himself amenable to a warrant for his arrest from the proper county, and, if not sooner arrested thereon, will attend at the office of the Sheriff of the county where the trial was had, at a certain time particularly specified in the undertaking, to surrender himself upon the warrant, if issued, or that his bail will forfeit such sum as the Court may fix, to be mentioned in the undertaking; and the Clerk must forthwith transmit a certified copy of the indictment, and of all the papers filed in the action, to the District Attorney of the proper county, the ex-

pense of which transmission is chargeable to that county.

NOTE.—See *People vs. Mellon*, 40 Cal., p. 648; *People vs. Stakem*, 40 Cal., p. 597.

1116. (§§ 385, 386.) If the defendant is not arrested on a warrant from the proper county, as provided in Section 1115, he must be discharged from custody, or his bail in the action is exonerated, or money deposited instead of bail must be refunded, as the case may be, and the sureties in the undertaking, as mentioned in that section, must be discharged. If he is arrested, the same proceedings must be had thereon as upon the arrest of a defendant in another county on a warrant of arrest issued by a magistrate. Same.

1117. (§§ 387, 388.) If the jury is discharged because the facts as charged do not constitute an offense punishable by law, the Court must order that the defendant, if in custody, be discharged; or if admitted to bail, that his bail be exonerated; or if he has deposited money instead of bail, that the money be refunded to him, unless in its opinion a new indictment can be framed upon which the defendant can be legally convicted, in which case it may direct that the case be submitted to the same or another Grand Jury; and if the Court directs that the case be submitted anew, the same proceedings must be had thereon as are prescribed in Section 998. Proceedings, if jury discharged because the facts do not constitute an offense. X

NOTE.—As a matter of course the order and the ground of the order are to be made a matter of record.

1118. (§ 389.) If, at any time after the evidence on either side is closed, the Court deems it insufficient to warrant a conviction, it may advise the jury to acquit the defendant. But the jury are not bound by the advice. When evidence on either side is closed, Court may advise jury to acquit.

NOTE.—See history of case in *People vs. Webb*, cited in note to Sec. 1112, ante.

View of
premises,
when
ordered
and how
conducted.

1119. (§ 390.) When, in the opinion of the Court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of the Sheriff, to the place, which must be shown to them by a person appointed by the Court for that purpose; and the Sheriff must be sworn to suffer no person to speak or communicate with the jury, nor to do so himself, on any subject connected with the trial, and to return them into Court without unnecessary delay, or at a specified time.

Knowledge
of juror to
be declared
in Court,
and he to
be sworn as
a witness.

1120. (§ 392.) If a juror has any personal knowledge respecting a fact in controversy in a cause, he must declare the same in open Court during the trial. If, during the retirement of the jury, a juror declare a fact which could be evidence in the cause, as of his own knowledge, the jury must return into Court. In either of these cases, the juror making the statement must be sworn as a witness and examined in the presence of the parties.

Jurors may
be
permitted
to separate
during
trial.

If kept
together,
oath of
officer.

1121. (§ 393.) The jurors sworn to try an indictment may, at any time before the submission of the cause to the jury, in the discretion of the Court, be permitted to separate or be kept in charge of a proper officer. The officer must be sworn to keep the jurors together until the next meeting of the Court, to suffer no person to speak to them or communicate with them, nor to do so himself, on any subject connected with the trial, and to return them into Court at the next meeting thereof.

Jury at
each
adjourn-
ment must
be admon-
ished, etc.

1122. (§ 394.) The jury must also, at each adjournment of the Court, whether permitted to separate or kept in charge of officers, be admonished by the Court that it is their duty not to converse among themselves or with any one else on any subject con-

See page 413

connected with the trial, or to form or express any opinion thereon until the cause is finally submitted to them.

1123. (§ 395.) If, before the conclusion of the trial, a juror becomes sick, so as to be unable to perform his duty, the Court may order him to be discharged. In that case a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or afterwards impaneled.

Proceedings when juror becomes unable to perform his duties.

1124. (§ 396.) The Court must decide all questions of law which arise in the course of a trial.

Court to decide questions of law arising during trial.

NOTE.—An Act of the Legislature, passed between the commission of the crime and the death of the person on whom the crime was perpetrated, which declares all offenses then committed to be punishable under the law in existence at the date of the Act, is valid and binding.—People vs. Gill, 6 Cal., p. 637; see, also, Secs. 3, 6, ante; and ample note to Sec. 1102, ante, and cases there cited. The next section makes libel an exception.

1125. (§ 397.) On the trial of an indictment for libel, the jury have the right to determine the law and the fact.

On indictment for libel, jury to determine law and fact.

NOTE.—State Const., Art. I, Sec. 9, Political Code, Appendix.

1126. (§ 398.) On the trial of an indictment for any other offense than libel, questions of law are to be decided by the Court, questions of fact by the jury; and, although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are bound, nevertheless, to receive as law what is laid down as such by the Court.

In all other cases Court to decide questions of law.

NOTE.—See note to Secs. 1093, Subd. 6, ante, and 1127, post; People vs. Anderson, recent case, and cited elsewhere in this Chapter, on the question of reading law to jury.—July Term, 1872 (No. 2655).

1127. (§§ 399, 400, 401.) In charging the jury, the Court must state to them all matters of law neces-

Charging the jury.

sary for their information. Either party may present to the Court any written charge and request that it be given. If the Court thinks it correct and pertinent, it must be given; if not, it must be refused. Upon each charge presented and given or refused, the Court must indorse and sign its decision. If part be given and part refused, the Court must distinguish, showing by the indorsement what part of the charge was given and what part refused.

NOTE.—*Instructions* asked, having no application, though correct, may be refused.—*People vs. Roberts*, 6 Cal., p. 214. When instructions are refused, because similar instructions are already given, the refusal may mislead the jury, unless the ground of the refusal is stated in the hearing of the jury.—*People vs. Hurley*, 8 Cal., p. 390; see, also, *People vs. Ramirez*, 13 Cal., p. 172; *People vs. King*, 27 Cal., p. 507. If the instruction asked, on a point already included in instructions given, is not in language *clear* and *explicit*, the ground of the refusal not being stated in the hearing of the jury, will not be error.—*People vs. Hobson*, 17 Cal., p. 424. Instructions deemed necessary, either from the course of the argument or to prevent injustice because not offered prior to argument, may be given by the Court, or those of the Court already given may be properly explained.—*People vs. Sears*, 18 Cal., p. 635. Not error to refuse to give such as are already given.—*People vs. Kelly*, 28 Cal., p. 423; *People vs. Strong*, 30 Cal., p. 151. Irrelevant instructions may be refused without error.—*People vs. Juarez*, 28 Cal., p. 280. To the same effect as to others refused on a point already instructed on.—See *People vs. Williams*, 32 Cal., p. 280. Unless clearly covered by those given, an instruction on the part of the defendant should not be refused, nor should a District Attorney object to them. *People vs. Lachanais*, 32 Cal., p. 433; see note to Sec. 1102, ante, and Sec. 1093, Subd. 6, and note, and therein of oral instructions.

1127. See, generally: *People v. Hart*, 44 Cal. 598. Where a party in a criminal case, fails to ask the Court to give instructions to the jury upon a particular point, he cannot complain of the error on the part of the Court in not giving the instructions. *People v. Haun*, 44 Cal. 96. Where an instruction asked for has already been given substantially by the Court, it is not error to refuse it; but in a criminal case the better course is to give it. *People v. Murray*, 41 Cal. 66.

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Jury may decide in Court or retire in custody of officer. Oath of officers.

1128. (§ 402.) After hearing the charge, the jury may either decide in Court or may retire for deliberation. If they do not agree without retiring, an officer must be sworn to keep them together in some private and convenient place, and not to permit

any person to speak to or communicate with them, nor to do so himself, unless by order of the Court, or to ask them whether they have agreed upon a verdict, and to return them into Court when they have so agreed, or when ordered by the Court.

1129. (§ 403.) When a defendant who has given bail appears for trial, the Court may, in its discretion, at any time after his appearance for trial, order him to be committed to the custody of the proper officer of the county, to abide the judgment or further order of the Court, and he must be committed and held in custody accordingly.

When defendant on bail appears for trial he may be committed

NOTE.—And this may be done, notwithstanding bail may have been taken, or directed to be taken, by the Supreme Court, or a Justice thereof. This note is suggested by the recent Tip McLaughlin case, in the Sixth District Court, for Sacramento County. It would seem to be the proper course to pursue in all cases where there is affixed a capital punishment to the crime for which the defendant is about to be tried. It would appear strange for a defendant to be able, by the forfeiture of bail, to avoid the extreme penalty of the law. If payment of the bail bond would suffice, the very rich might never be punished.

Upon a trial for larceny or embezzlement of money at law, bank notes, certificates of stock, or valuable securities, the allegation of the indictment, so far as regards the description of the property, is sustained if offender be proved to have embezzled or stolen any money, bank notes, certificates of stock, or valuable security, although the particular species of coin or other property, or the number, denomination, or kind of bank notes, certificates of stock, or valuable security, be not proved; and upon a trial for embezzlement, if the offender be proved to have embezzled any piece of coin or other money, any bank note, certificate of stock, or valuable security, although such piece of coin or other property, or such bank note, certificate of stock, or valuable security, may have been delivered to him in order to receive some part of the value thereof should be returned to the party delivering the same, and such part shall be returned accordingly.

If District Attorney fails to attend, Court may appoint.

IS SUBMITTED

jury after retire-

together.

them.

SECTION 1138. If after retirement may return into Court for information.

1139. If juror after retirement become sick, etc., jury to be discharged.

1140. Not to be discharged for any other cause, unless there is no reasonable probability that they can agree.

1141. When jury discharged or prevented from giving a verdict, cause to be again tried.

1142. Court may adjourn during absence of jury, but deemed open for all purposes connected with cause.

1143. Final adjournment discharges jury.

Room and accommodations for the jury after retirement, how provided.

1135. (§ 404.) A room must be provided by the Supervisors of each county for the use of the jury, upon their retirement for deliberation, with suitable furniture, fuel, lights, and stationery. If the Supervisors neglect, the Court may order the Sheriff to do so, and the expenses incurred by him in carrying the order into effect, when certified by the Court, are a county charge.

NOTE.—See "Other county charges," Political Code Cal., Sec. 4344, Subd. 3.

Accommodations for jury when kept together.

1136. (§ 405.) While the jury are kept together, either during the progress of the trial or after their retirement for deliberation, they must be provided by the Sheriff, at the expense of the county, with suitable and sufficient food and lodging.

What papers the jury may take with them.

1137. (§§ 406, 407.) Upon retiring for deliberation, the jury may take with them all papers (except depositions) which have been received as evidence in the cause, or copies of such public records or private documents given in evidence as ought not, in the opinion of the Court, to be taken from the person having them in possession. They may also take with them the written instructions given, and notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person.

NOTE.—It heretofore rested in the discretion of the Court to permit the jury to take the instructions with

them to the jury room. It was frequently cause for their return to inquire in regard to the instructions; hence the necessity and propriety of the change.

1138. After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into Court. Upon being brought into Court, the information required must be given in the presence of, or after notice to, the District Attorney, and the defendant or his counsel, or after they have been called.

If after retirement may return into Court for information.

present on all such occasions, and his attorney should be present or have notice to appear. The notice should also be given in cases of misdemeanor.—See Sec. 1148, and note to Sec. 1181, post, Subd. 1. It is a fatal error for a jury to return into Court and receive instructions in the absence of defendant's attorney, or without proof of notice to him of their return, when they have retired, under instructions of the Court, to deliberate upon their verdict.—People vs. Trim, 37 Cal., p. 274. And this is so though the defendant was present in person.—Id.

1139. (§ 409.) If, after the retirement of the jury, one of them be taken so sick as to prevent the continuance of his duty, or any other accident or cause occur to prevent their being kept for deliberation, the jury may be discharged.

If juror after retirement become sick, etc., jury to be discharged.

1140. (§ 410.) Except as provided in the last section, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open Court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the Court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.

Not to be discharged for any other cause, unless there is no reasonable probability that they can agree.

NOTE.—Under the ruling of the Supreme Court in the case of The People vs. Webb, 38 Cal., p. 467, it was claimed in The People vs. Tip. McLaughlin, on

habeas corpus (not yet published, but decided in the year 1871), that a discharge of the jury against the objection of the defendant operated as an acquittal; but the Supreme Court did not so hold. They, however, admitted the defendant to bail, and subsequently the Court below, on the conviction of the defendant, declined to *commit him* because the Supreme Court had *admitted him to bail*. This latter act was certainly error.

When jury discharged or prevented from giving a verdict, cause to be again tried.

1141. (§ 411.) In all cases where a jury are discharged or prevented from giving a verdict by reason of an accident or other cause, except where the defendant is discharged from the indictment during the progress of the trial or after the cause is submitted to them, the cause may be again tried at the same or another term.

NOTE.—See note to Sec. 1181, post.

Court may adjourn during absence of jury, but deemed open for all purposes connected with cause.

1142. (§ 412.) While the jury are absent the Court may adjourn from time to time, as to other business, but it must nevertheless be open for every purpose connected with the cause submitted to the jury until a verdict is rendered or the jury discharged.

Final adjournment discharges jury.

1143. (§ 413.) A final adjournment of the Court discharges the jury.

CHAPTER IV.

THE VERDICT.

SECTION 1147. Return of jury.

1148. Appearance of defendant.

1149. Manner of taking verdict.

1150. Verdict may be general or special.

1151. General verdict.

1152. Special verdict.

1153. Special verdict, how rendered.

1154. Form of special verdict.

1155. Judgment on special verdict.

1156. When special verdict defective, new trial to be ordered.

1157. Jury to find degree of crime.

SECTION 1158. Jury may find upon charge of previous conviction.

1159. Jury may convict of lesser offense, or of attempt.

1160. Verdict as to some defendants, and another trial as to others.

1161. In what cases Court may direct a reconsideration of the verdict.

1162. When judgment may be given on informal verdict.

1163. Polling the jury.

1164. Recording the verdict.

1165. Defendant, when to be discharged or detained after acquittal.

1166. Proceedings upon general verdict of conviction or a special verdict.

1147. (§ 414.) When the jury have agreed upon their verdict they must be conducted into Court by the officer having them in charge. Their names must then be called, and if all do not appear, the rest must be discharged without giving a verdict. In that case the action may be again tried at the same, or another term.

Return of jury.

1148. (§ 415.) If indicted for a felony, the defendant must, before the verdict is received, appear in person. If for a misdemeanor, the verdict may be rendered in his absence.

Appearance of defendant.

1149. (§ 416.) When the jury appear they must be asked by the Court, or Clerk, whether they have agreed upon their verdict, and if the foreman answers in the affirmative, they must, on being required, declare the same.

Manner of taking verdict.

1150. (§ 417.) The jury may render a general verdict, or, when they are in doubt as to the legal effect of the facts proved, they may, except upon an indictment for libel, find a special verdict.

Verdict may be general or special.

1151. A general verdict upon a plea of not guilty is either "guilty" or "not guilty," which imports a conviction or acquittal of the offense charged in the indictment. [Upon a plea of a former conviction or acquittal of the same offense, it is either "for the people" or "for the defendant." When the defendant is acquitted on the ground that he was insane at the time of the commission of the act charged, the verdict must be "not guilty by reason of insanity." When

General verdict.

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between the indictment and the proof, the verdict must be "not guilty by reason of variance between indictment and proof."

vide 1021

NOTE.—If a general verdict of guilty is rendered, it is a conviction on every material allegation charged in the indictment, and if the indictment is for murder, so is the verdict; but if the jury intend a conviction of a lesser offense than the principal offense charged but necessarily included in it, the offense of which the jury so intended to find the defendant guilty must be specified.—People vs. March, 6 Cal., p. 543. On an indictment for murder, the verdict must specify whether it is of the first or second degree, and if it does not the Court ought to order the jury to make the specific finding.—People vs. Marquis, 15 Cal., p. 38. A recommendation to mercy is improperly stated in the verdict, as it is addressed to the Court; but being no part of the verdict does not vitiate it, and it is not error for the Court to direct the verdict, without the recommendation, to be recorded.—People vs. Lee, 17 Cal., p. 16. It is the duty of the jury to determine the degree of guilt, and, though the indictment charge murder in the second degree, it was held that the jury might find a verdict of guilty of murder in the first degree.—People vs. Nichol, 34 Cal., p. 211. Under an indictment for "an assault with intent to commit murder," a verdict of the jury "guilty of an assault with intent to do bodily injury," is a conviction of a simple assault only.—People vs. Vanard, 6 Cal., p. 562; but see People vs. English, 30 Cal., p. 214, where it was held that a judgment for a felony was sustained by such a verdict, with the addition in the verdict that the assault was "with a deadly weapon." Verdict does not cure the defects of an indictment.—People vs. Wallace, 9 Cal., p. 30. A verdict is conclusive as to the venue having been proved when it reads "guilty as charged in the indictment," and the indictment charges the place.—People vs. Magallones, 15 Cal., p. 426. Verdict acquitting defendant of forging and uttering indorsement on an instrument is not an estoppel upon any matter *aliunde*.—People vs. Frank, 28 Cal., p. 507. To find one guilty who is not named in the indictment is finding the one named not guilty.—People vs. Ah Ye, 31 Cal., p. 451. But entitling the cause in the case as originally named in the indictment, when the true named was discovered and used on the trial, is not vital error, and judgment is sustained against the true defendant.—People vs. Ah

Kim, 34 Cal., p. 189. If defendant is not present when verdict is rendered, but enters immediately after it, and before the jury is discharged, unless his rights are prejudiced it will not be held to be vital error.—People vs. Miller, 33 Cal., p. 99.

1152. (§ 419.) A special verdict is that by which the jury find the facts only, leaving the judgment to the Court. It must present the conclusions of fact as established by the evidence; and not the evidence to prove them, and these conclusions of fact must be so presented as that nothing remains to the Court but to draw conclusions of law upon them. Special verdict.

NOTE.—A Court may not direct a jury to find a certain verdict, either special or general, but may, on request, instruct them as to their right to find either.—People vs. Antonio, 27 Cal., p. 404.

1153. (§ 420.) The special verdict must be reduced to writing by the jury, or in their presence entered upon the minutes of the Court, read to the jury and agreed to by them, before they are discharged. Special verdict, how rendered.

NOTE.—See note to Sec. 1151, ante, and 1181, post, and notes.

1154. (§ 421.) The special verdict need not be in any particular form, but is sufficient if it present intelligibly the facts found by the jury. Form of special verdict.

1155. (§ 422.) The Court must give judgment upon the special verdict as follows: Judgment on special verdict.

1. If the plea is not guilty, and the facts prove the defendant guilty of the offense charged in the indictment, or of any other offense of which he could be convicted under that indictment, judgment must be given accordingly. But if otherwise, judgment of acquittal must be given.

2. If the plea is a former conviction or acquittal of the same offense, the Court must give judgment of acquittal or conviction, as the facts prove or fail to prove the former conviction or acquittal.

NOTE.—Subd. 1.—See note to Sec. 1151, ante, and cases there cited. See, also, note to Sec. 1016, ante, Subd. 2, and cases there cited. A defendant may be found guilty of any offense necessarily included within that charged in the indictment. As an example, manslaughter in an indictment for murder.—*People vs. English*, 30 Cal., p. 214. See cases cited elsewhere in the preceding chapter, and note to Sec. 1102, ante. Of an assault with a deadly weapon with the intent to do great bodily harm, under an indictment for an assault with a deadly weapon with intent to do murder.—*People vs. Congleton*, July Term, 1872 (No. 3382); *People vs. Jacobs*, 29 Cal., p. 579; *People vs. Davidson*, 5 Cal., p. 133; *Ex Parte Ah Cha*, 40 id., p. 426; *People vs. Vanard*, 6 Cal., p. 562; *People vs. English*, 30 Cal., p. 214. A verdict “guilty of an assault with a deadly weapon with intent to do bodily harm on the person of A. F. Murphy,” is equivalent to the language of the statute, “assault with a deadly weapon * * * with intent to inflict on the person of another a bodily injury.”—Secs. 217, 220, ante (old § 50). “To do bodily harm upon the person of another,” is certainly to “inflict upon the person of another a bodily injury.” The modes of expression are of the same import.—*People vs. Congleton*, July Term, 1872 (No. 3382).

Subd. 2.—See Sec. 1016, ante, Subd. 3 and note, with cases there cited.

When
special
verdict
defective,
new trial
to be
ordered.

1156. (§ 423.) If the jury do not, in a special verdict, pronounce affirmatively or negatively on the facts necessary to enable the Court to give judgment, or if they find the evidence of facts merely, and not the conclusions of fact, from the evidence, as established to their satisfaction, the Court must order a new trial.

Jury to find
degree of
crime.

1157. Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty.

NOTE.—Stats. 1856, p. 219, Sec. 2. In *The People vs. Campbell*, October Term, 1870 (40 Cal., p. 137), the Court say: “On the trial the jury rendered a verdict finding him guilty of the crime charged in the indictment,” and recommended him to the mercy of the Court, but did not specify the degree of murder of which they found him guilty. The defendant moved

DIFFERENT COUNTS.—Prosecution cannot be required to select which of several counts, charging the same crime, the defendant shall be tried upon.—*People vs. Shotwell*, 27 Cal., p. 394. Where burglary and larceny are commingled in an indictment, and a trial is had for burglary, without demurrer, it would be error to instruct the jury that they might find the defendant guilty of larceny.—*People vs. Garnett*, 29 Cal., p. 622.

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Verdict as to some defendants, and another trial as to others.

In what cases Court may direct a reconsideration of the verdict.

sider their verdict, and if, after the reconsideration, they return the same verdict, it must be entered; but when there is a verdict of acquittal, the Court cannot require the jury to reconsider it. If the jury render a verdict which is neither general nor special, the Court may direct them to reconsider it, and it cannot be recorded until it is rendered in some form from which it can be clearly understood that the intent of the jury is either to render a general verdict or to find the facts specially and to leave the judgment to the Court.

NOTE.—See note to Sec. 1151, ante, and cases there cited.

When judgment may be given on informal verdict.

1162. (§ 428.) If the jury persist in finding an informal verdict, from which, however, it can be clearly understood that their intention is to find in favor of the defendant upon the issue, it must be entered in the terms in which it is found, and the Court must give judgment of acquittal. But no judgment of conviction can be given unless the jury expressly find against the defendant upon the issue, or judgment is given against him on a special verdict.

Polling the jury.

1163. (§ 429.) When a verdict is rendered, and before it is recorded, the jury may be polled, at the request of either party, in which case they must be severally asked whether it is their verdict, and if any one answer in the negative, the jury must be sent out for further deliberation.

Recording the verdict.

1164. (§ 430.) When the verdict given is such as the Court may receive, the Clerk must immediately record it in full upon the minutes, read it to the jury, and inquire of them whether it is their verdict. If any juror disagree, the fact must be entered upon the minutes and the jury again sent out; but if no disagreement is expressed, the verdict is complete, and the jury must be discharged from the case.

1164. The irregularity of receiving a verdict in a criminal case, without first calling over the names of the jurors, does not prejudice a defendant if the jury were all present and had agreed. *People v. Rondo*, 44 Cal. 538.

1165. (§ 431.) If judgment of acquittal is given on a general verdict, and the defendant is not detained for any other legal cause, he must be discharged as soon as the judgment is given, except where the acquittal is because of a variance between the proof and the indictment, which may be obviated by a new indictment, the Court may order his detention, to the end that a new indictment may be preferred, in the same manner and with like effect as provided in Section 1117.

Defendant, when to be discharged or detained after acquittal.

NOTE.—Where the variance is of such a character that a conviction is impossible, the defendant has not been in "jeopardy," and may be tried again.—People vs. McNealey, 17 Cal., p. 332. See as to variance, People vs. Frank, 28 Cal., p. 507; People vs. Wilson, 9 Cal., p. 259; People vs. Hughes, 29 Cal., p. 257.

1166. (§ 432.) If a general verdict is rendered against the defendant, or a special verdict is given, he must be remanded, if in custody, or if on bail he may be committed to the proper officer of the county to await the judgment of the Court upon the verdict. When committed his bail is exonerated, or if money is deposited instead of bail it must be refunded to the defendant.

Proceedings upon general verdict of conviction or a special verdict.

NOTE.—State v. [REDACTED]:

87. If the jury render a verdict of acquittal on ground of insanity, the Court may order a jury to be summoned from the jury list of the county, to inquire whether the defendant continues to be insane. The Court may cause the same witnesses to be examined who testified on the trial, and other witnesses, and direct the District Attorney to conduct the proceedings, and counsel may appear for the defendant. The Court may direct the Sheriff to take the defendant into his custody until the question of insanity is determined. If the jury find the defendant insane, he shall be committed by the Sheriff to the Insane Asylum. If the jury find the defendant sane, he shall be discharged.

In what cases.

1170. (§ 433.) On the trial of an issue, exceptions may be taken by the defendant:

1. The Court upon a matter of law, in all of the following cases:
 2. In disallowing a challenge to the panel of a challenge to an individual juror, for implication.
 3. In admitting or rejecting witnesses or in deciding any question of law not a matter of fact, or in charging the triers on the trial of a challenge for actual bias;

Where in admitting or rejecting witnesses or testimony, in deciding any question of law not a matter of fact, or in charging or instructing the jury on the law on the trial of the issue.

NOTE.—Subd. 1.—See Secs. 1055-1068, ante, and notes; particularly Secs. 1055 and 1074, and notes.

Subd. 2.—See Secs. 1078, 1073, and 1102, ante, and notes.

Subd. 3.—See Secs. 1102, 1093, Subd. 6; Sec. 1127, ante, and notes.

Generally.—See Sec. 1068, ante, and notes.

When to be settled and signed.

1171. (§ 434.) A bill of exceptions must be settled and signed with the Clerk within ten days after the trial, unless further time is granted by a Justice of the Supreme Court.

NOTE.—This section is taken from Lee, 14 Cal., p. 510. It requires the bill of exceptions to be settled and signed within ten days after the trial, unless further time is granted by a Justice of the Supreme Court. If a failure to do so is heard, and the bill is not settled and signed, the bill is not valid.

1172. Where a party desires to have the exceptions taken at the trial settled in a bill of exceptions, a draft of a bill must be prepared by him and presented upon notice of at least two days to the District Attorney, to the Judge for settlement, within ten days after the trial of the cause, unless further time is granted by the Judge, or by a Justice of the Supreme Court. Within that period the draft must be delivered to the Clerk of the Court for the Judge. When received by the Clerk, he must deliver it to the Judge, or transmit it to him at the earliest period practicable. When the bill must be signed by the Judge and filed with the Clerk of the Court.

Exceptions not taken on the trial, but which may be taken by both parties.

1172. Exceptions may be taken after a decision of the Court on a matter of law:

1. In granting or refusing a motion in arrest of judgment;
2. In granting or refusing a motion for a new trial;
3. In making, or refusing to make, an order after

Subd. 3.—See Sec. 1237, Subd. 3, post, and note.

**Exceptions
not taken
on the trial,
but which
may be
taken by
the
defendant.**

- NOTE.—Subd. 1, ante to Sec. 1034, ante.
Subd. 2, ante to Sec. 1052, ante.

Exceptions mentioned in two preceding sections, how and when settled.

What bill of exceptions is to contain.

Written charges not to be excepted to.

Same.

been taken down by the Reporter, the questions presented in such charges need not be excepted to or embodied in a bill of exceptions, but the written charges or the report, with the indorsements showing the action of the Court, form part of the record, and any error in the decision of the Court thereon may be taken advantage of on appeal, in like manner as if presented in a bill of exceptions.

NOTE.—It is evident that Secs. 438 (Code Sec. 1176) and 462 (Code Sec. 1207) refer to the written charges or instructions which either party may present and ask to be given, in accordance with Secs. 400 and 401 (Code Sec. 1127). They are not by statute made a part of the judgment roll, as they should be, for this Court, of its own motion, to notice error in them.—*People vs. Hart*, October Term, 1872 (No. 3426). But see Subd. 8 of Sec. 1207, post, and note, where they are made part of the judgment roll by the Code.

BILLS OF EXCEPTION.—Rulings upon by the California Supreme Court: Where there was exception shown to be taken to the exhibition of burglarious tools only, it will be presumed that the necessary evidence was shown upon which to base such introduction.—*People vs. Winter*, 29 Cal., p. 658. Objections to the drawing and impaneling the jury come too late on a motion for a new trial. They are deemed to be waived if not taken at the proper time.—*People vs. Coffman*, 24 Cal., p. 230; *People vs. Fair*, January Term, 1872. In order to entitle errors complained of to review, they must be set out in a settled bill of exceptions, properly signed.—*People vs. Ferguson*, 34 Cal., p. 309. It is not sufficient simply to object that defendant was not present at times when acts can only be done in his presence; he must prove his absence.—*People vs. Stuart*, 4 Cal., p. 218.

CHAPTER VI.

NEW TRIALS.

SECTION 1179. New trial defined.

1180. Its effect.

1181. In what cases it may be granted.

1182. Application for, when made.

1179. (§ 439.) A new trial is a reëxamination of the issue in the same Court, before another jury, after a verdict has been given. New trial defined.

1180. The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict cannot be used or referred to either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the indictment.

1181. (§ 440.) When a verdict has been rendered against the defendant, the Court may, upon his application, grant a new trial, in the following cases only: In what cases it may be granted.

1. When the trial has been had in his absence, if the indictment is for a felony;

2. When the jury has received any evidence out of Court other than that resulting from a view of the premises;

3. When the jury has separated without leave of the Court, after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented;

4. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors;

5. When the Court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial;

6. When the verdict is contrary to law or evidence;

7. When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the Court may

postpone the hearing of the motion for such length of time as, under all the circumstances of the case, may seem reasonable.

NOTE.—Stats. 1863, p. 158, Sec. 17. The case of *The People vs. Plummer*, 9 Cal., p. 298, which held “that an objection to the competency of a juror might be made by the prisoner for the first time after verdict,” was overruled in *People vs. Laura D. Fair*, January Term, 1872 (No. 2988). When the statute undertakes to enumerate the grounds upon which the judgment may be arrested, the intention to exclude all others is apparent. *Id.*; see, also, *People vs. Coffman*, 24 Cal., p. 230.

Subd. 1.—Defendant must show his absence.—*People vs. Stuart*, 4 Cal., p. 218; *People vs. Trim*, 37 Cal., p. 274. In the latter case it was held to be fatal error.

Subd. 2.—If witness had spoken to juror, when out of Court to view the premises, on the subject of the case, it would have been error.—See note to Sec. 1102, ante. Where the case of a witness conversing with one or more jurors on the facts of the case, when out of Court to view the premises, considered.—*People vs. Voll*, April Term, 1872 (No. 2596.)

Subd. 3.—To separate, so that a juror may be improperly influenced, unless under permission of the Court, is error.—*People vs. Backus*, 5 Cal., p. 275. Defendant's counsel consenting does not authorize it.—*Id.* It is not ground, under this subdivision, for setting aside a verdict, that jurors lifted up a fainting witness and retired with her, the Deputy Sheriff being with them.—*People vs. Lee*, 17 Cal., p. 76. Nor is separating for a very short time and going to a privy, under care of a Deputy Sheriff, and not conversing, good cause or ground under this subdivision.—*People vs. Bonney*, 19 Cal., p. 426. In this case the rule in the case of *Backus*, supra, is said to be stated very strongly. In *People vs. Boggs*, 20 Cal., p. 432, many trivial circumstances—of absence from the jury by Deputy Sheriff, some one speaking to jury in his absence, but it not appearing of what, and so forth—was held not to entitle defendant to new trial. These occurrences ought to show that a substantial or material violation of defendant's rights either had happened or that an opportunity for such to occur had been permitted. If, however, there is a direct violation of a rule not to separate, it is such an irregularity as to entitle the defendant to a new trial, unless the prosecution show that the defendant was not prejudiced.—*People vs. Branigan*,

1181. (Subd. 3.) The retirement of the jury for a necessary purpose for a few moments, with the permission of the Sheriff, and positive proof that during such retirement they did not communicate with any one or with each other, is not sufficient ground for a new trial. *People v. Moore*, 41 Cal. 238.

21 Cal., p. 337; see, also, as to rebutting the presumption of prejudice to defendant, arising from the unpermitted separation of the jury, *People vs. Symonds*, 22 Cal., p. 348. Passing remarks are not supposed to be of sufficient import to grant a new trial therefor.—*Branigan's case*, *supra*. Judgment will not be reversed because the jury were not charged by the Court, as provided by Sec. 1122, ante, unless it is shown that defendant sustained some injury.—*People vs. Colmere*, 23 Cal., p. 631. Presumptions are in favor of jurors performing their duty.—*People vs. Williams*, 24 Cal., p. 31. An improper discharge of a jury does not operate as an acquittal of the defendant.—*People vs. Shotwell*, 27 Cal., p. 294; *People vs. Tip McLaughlin*, on habeas corpus, not reported, referred to, ante. The affidavit of a juror that his own verdict, with that of his cojurymen, was not a fair expression of opinion, does not successfully impeach the verdict.—*People vs. Wyman*, 15 Cal., p. 70. Nor will such affidavit, disclosing the fact that he had previously formed and expressed an opinion before the trial, justify a new trial.—*People vs. Baker*, 1 Cal., p. 403; see, also, *People vs. Laura D. Fair*, January Term, 1872 (No. 2988); overruling *People vs. Plummer*, 9 Cal., p. 298. In the *Fair* case it is held that the question of competency of the juror cannot be raised after verdict for the first time.

Subd. 4.—Affidavit of a juror cannot impeach his verdict by declaring it not to be a fair expression.—*People vs. Wyman*, 15 Cal., p. 70. It will not be permitted to be shown that one or more of the jurors agreed to the verdict under the impression that the Court, and not the law, fixed the punishment.—*People vs. Lee*, 17 Cal., p. 76. For decision and verdict arrived at by lot or chance, see *Boyce vs. Cal. Stage Co.*, 25 Cal., p. 460.

Subd. 5.—See note to Sec. 1102, ante, on this point. Error will not be *presumed* has been so repeatedly held it is only necessary to refer to the last case in support of this rule.—*People vs. McAuslin*, January Term, 1872 (No. 3021). The judgment and orders below will not be disturbed here unless error is in some way made to appear.—*Id.* On the ground that the evidence is insufficient to justify, if a new trial is granted, a reversal can only be had on showing error, "and even then it would probably but rarely be disturbed here," for the views of the Court below, formed as they are on personal observation of the manner and general demeanor of the witnesses, are entitled to the utmost considera-

11. 186. Generally: The disqualification of a juror is not a ground for a new trial, when the objection is taken for the first time after the verdict. *People v. Fair*, 43 Cal. 137, overruling *People v. Plummer*, 9 Cal. 298. The words "in the following cases" only clearly exclude all other grounds whatsoever. *People v. Fair*, 43 Cal. 137. The Court will grant a new trial on the ground that the evidence does not justify the verdict, if the evidence is conflicting. *People v. Gill*, 45 Cal. 285.

182. A motion for new trial must be made *viva voce*, and if denied, the ground of the motion and the rulings of the Court thereon must be embodied in a bill of exceptions, and can be reviewed by the Supreme Court in no other way. *People v. Ah Sam*, 41 Cal. 645.

tion.—*People vs. Woods*, January Term, 1872 (No. 3141).

Subd. 6.—Insufficient evidence to warrant the verdict.—See *People vs. Juan San Martin*, 2 Cal., p. 484. Want of sufficient evidence must be not only apparent, but there must be such strong evidence against the verdict as to produce the inference that it was rendered under the influence of passion, or prejudice, or other bias.—*People vs. Vance*, 21 Cal., p. 400. A verdict in a criminal case will not be disturbed or interfered with unless there is such want of evidence against or preponderance for him as to warrant it.—*People vs. Ah Loy*, 10 Cal., p. 301. Nor will an appeal be considered from an order on motion for new trial unless accompanied with a bill of exceptions or statement, settled and certified. A long-hand copy of a short-hand report of the notes of the official Reporter was not intended to be such statement or bill of exceptions.—See on this subject, *People vs. Thompson*, 28 Cal., p. 218; *People vs. Martin*, 32 Cal., p. 91; *People vs. Ferguson*, 34 Cal., p. 309; *People vs. Trim*, 37 Cal., p. 274; *People vs. Tetherow*, 40 Cal., p. 286.

Subd. 7.—When newly discovered evidence is the ground of the motion, and set out, sufficient of the circumstances should also be stated to show its materiality and admissibility; particularly should this be done when the evidence is of exceptional character.—*People vs. Voll*, April Term, 1872 (No. 2596).

Application for,
when made

1182. (§ 441.) The application for a new trial must be made before judgment.

CHAPTER VII.

ARREST OF JUDGMENT.

SECTION 1185. Motion in arrest of judgment defined. Upon what defects founded, and when made.

1186. Court may arrest judgment without motion.

1187. Effect of arresting judgment.

1188. Defendant, when to be held or discharged.

Motion in
arrest of
judgment
defined.

1185. (§§ 442, 444.) A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea or verdict of

guilty, or on a verdict against the defendant, on a plea of a former conviction or acquittal. It may be founded on any of the defects in the indictment mentioned in Section 1004, unless the objection to the indictment has been waived by a failure to demur, and must be made before or at the time the defendant is called for judgment.

Upon what
defects
founded,
and
when made

NOTE.—People vs. Shotwell, 27 Cal., p. 408. Motion in arrest of judgment, based, as in this section provided, on the defects of the indictment mentioned in Sec. 1004, must specifically set out the defects to entitle the point to consideration in the Supreme Court.—People vs. Dick, 37 Cal., p. 277. Formal defects, not affecting material rights of the defendant, do not authorize or justify an arrest of judgment.—Id. Criminal pleadings are tested by Secs. 243, 246, ante; id.; and People vs. Murphy, 39 Cal., p. 52. A motion in arrest of judgment may be made on any of the grounds of demurrer, and the action thereon had may be reviewed on appeal.—People vs. Turner, 39 Cal., p. 370. If offense is not committed in the county where the indictment was found the Court should, on its own motion, arrest the judgment.—People vs. Hodges, 27 Cal., p. 340. But when the acts constituting the offense are committed partly in one county and partly in another, and are one transaction, see People vs. Townsley, 39 Cal., p. 405. At the October Term, 1872 (filed November 20th), in the case of The People vs. Wooley (No. 1002), the defendant having been convicted of the crime of arson in the second degree, it was objected that the indictment was insufficient, because it does not sufficiently show that the alleged offense was committed at a place within the jurisdiction of the Court. The charge in the indictment is that: "The said John Wooley, on or about the 26th day of January, A. D. 1872, at the county and State aforesaid, then and there being, then and there did willfully, maliciously, deliberately, and feloniously burn and cause to be burned the dwelling house of one Thomas J. Keeton." By Secs. 87, 88 of the Criminal Practice Act (Code Secs. 781, 782, ante), it is provided that when an offense is committed in part in one county and part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, or when it is committed on the boundary of two or more counties, or within five hundred yards thereof,

1183. A Court may, upon its own motion, or upon the application of a party interested, during the continuance of the term, in a criminal case, modify or set aside an erroneous order, and may, upon its own view of fatal defects in an indictment, arrest the judgment without motion. *Ex-parte Hartman*, 44 Cal. 32. If the variance between the allegation in an indictment, and the proof be immaterial, it should be disregarded. *People v. Hughes*, 41 Cal. 231. Under an indictment for assault to commit murder, a conviction of assault made with a deadly weapon to do bodily harm cannot be supported, unless it sufficiently appear upon the face of the indictment that the assault was made with a deadly weapon. *People v. Murat*, 45 Cal. 281.

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jurisdiction shall be in either county. By Sec. 246 (Code Sec. 959, ante), it is declared that an indictment shall be sufficient, if it can be understood therefrom, among other things, that the offense was committed at some place within the jurisdiction of the Court. It appears from this indictment that the defendant then and there being in the county in which the indictment was found, then and there burned the dwelling house of Keeton. If, as is contended, the defendant may have been in one county, and the house in another, and more than five hundred yards distant from the boundary thereof, still the act, the effects of which were seen in the burning, must have been committed in the county in which he was. But if this were so, the offense was committed in part in that county, and the Court had jurisdiction. We think the indictment in the respect named sufficient, and that the demurrer was properly overruled. A variance in the name of the insurance company given in the indictment for arson, to defraud, and that proved, is not ground for arrest of judgment.—*People vs. Hughes*, 29 Cal., p. 257; *People vs. Schwartz*, 32 Cal., p. 165.

Court may
arrest
judgment
without
motion.

1186. (§ 443.) The Court may also, on its own view of any of these defects, arrest the judgment without motion.

NOTE.—As an instance wherein the Court will act of its own motion, see the case of *The People vs. Hodges*, 27 Cal., p. 340, cited in preceding note. An order granting a motion in arrest of judgment on account of alleged defects in the indictment, after judgment, is not an appealable order.—*People vs. Ah Kim*, Oct. Term, 1872 (No. 3278); *People vs. Clark* (No. 3101), Jan. Term, 1872.

Effect of
arresting
judgment.

1187. (§ 445.) The effect of allowing a motion in arrest of judgment is to place the defendant in the same situation in which he was before the indictment was found.

Defendant,
when to be
held or
discharged.

1188. (§ 446.) If, from the evidence on the trial, there is reason to believe the defendant guilty, and a new indictment can be framed upon which he may be convicted, the Court may order him to be recommitted to the officer of the proper county, or admitted to bail anew, to answer the new indictment. If the evidence

1187. The effect of an order arresting a judgment, is to place the defendant, as nearly as other controlling rules of law will permit, in the same situation in which he was before the indictment was found. Upon its entry, he must be discharged, unless detained by some other

shows him guilty of another offense, he must be committed or held thereon, and in neither case shall the verdict be a bar to another prosecution or indictment. But if no evidence appears sufficient to charge him with any offense, he must, if in custody, be discharged; or if admitted to bail, his bail is exonerated; or if money has been deposited instead of bail, it must be refunded to the defendant; and the arrest of judgment shall operate as an acquittal of the charge upon which the indictment was founded.

TITLE VIII.

OF JUDGMENT AND EXECUTION.

CHAPTER I. *The judgment.*

II. *The execution.*

CHAPTER I.

THE JUDGMENT.

SECTION 1191. Appointing time for judgment.

1192. Upon plea of guilty, Court must determine degree.

1193. Presence of defendant.

1194. When defendant in custody, how brought before the Court for judgment.

1195. How brought before the Court when on bail.

1196. Bench warrant to issue.

1197. Form of bench warrant.

1198. Warrant, how served.

1199. Arrest of defendant.

1200. Arraignment of defendant for judgment.

1201. What cause may be shown against the judgment.

1202. If no cause shown, judgment to be pronounced.

1203. Court may summarily inquire into circumstances in aggravation or mitigation of punishment.

SECTION 1204. Proof of former conviction, or of facts, etc., in mitigation, etc., how made. .

1205. Duration of imprisonment on judgment to pay a fine.

1206. Judgment to pay a fine constitutes a lien.

1207. Entry of judgment and judgment roll.

Appointing time for judgment

1191. After a plea or verdict of guilty, or after a verdict against the defendant on the plea of a former conviction or acquittal, if the judgment be not arrested or a new trial granted, the Court must appoint a time for pronouncing judgment, which, in cases of felony, must be at least two days after the verdict, if the Court intend to remain in session so long; but if not, then at as remote a time as can reasonably be allowed. n

The statute does not require that judgment must of necessity be pronounced at the same term at which the verdict was found. *People v. Felix*, 45 Cal. 163.

NOTE.—*People vs. Thompson*, 4 Cal., p. 238; *People vs. Noll*, 20 id., p. 164; *People vs. King*, 28 id., p. 265. The Court may, in the absence of the defendant, set a day for pronouncing sentence.—*People vs. Galvin*, 9 Cal., p. 115.

Upon plea of guilty, Court must determine degree.

1192. Upon a plea of guilty of a crime distinguished or divided into degrees, the Court must, before passing sentence, determine the degree.

NOTE.—See Sec. 189, ante. It is not necessary that the determination of the Court should be expressed in any particular form.—*People vs. Noll*, 20 Cal., p. 164. The proceeding under this section is not a trial, nor has the defendant any right to have the question involved determined by a jury. Nor is it necessary, in this proceeding, that the examination of witnesses should be on the same day as the entry of the plea; nor that any time should elapse between the determination and judgment.—*People vs. Noll*, 20 Cal., p. 164. In *Re Brown*, 32 Cal., p. 48, the defendant had pleaded guilty to an indictment for murder, which did not specify the degree. The Court imposed a sentence of confinement in the State Prison. *Held*, that the judgment was not a nullity for the presumption was that the Court, by testimony, ascertained the degree.

Presence of defendant.

1193. (§ 449.) For the purpose of judgment, if the conviction is for felony, the defendant must be per-

sonally present; if for a misdemeanor, judgment may be pronounced in his absence.

NOTE.—Upon a conviction for felony, it is necessary that the defendant should be present when judgment is pronounced; but the Court may, in the absence of the defendant, fix the day for pronouncing judgment.—People vs. Galvin, 9 Cal., p. 115. A Judge who did not preside at the trial may, if legally presiding at the time fixed, pronounce the judgment.—People vs. Henderson, 28 Cal., p. 465.

1194. (§ 450.) When the defendant is in custody, the Court may direct the officer in whose custody he is to bring him before it for judgment, and the officer must do so.

When defendant in custody, how brought before the Court for judgment.

1195. (§ 451.) If the defendant has been discharged on bail, or has deposited money instead thereof, and does not appear for judgment when his personal appearance is necessary, the Court, in addition to the forfeiture of the undertaking of bail, or of the money deposited, may direct the Clerk to issue a bench warrant for his arrest.

How brought before the Court when on bail.

1196. (§ 452.) The Clerk, on the application of the District Attorney, may, at any time after the order, whether the Court be sitting or not, issue a bench warrant into one or more counties.

Bench warrant to issue.

1197. (§ 453.) The bench warrant must be substantially in the following form:

Form of bench warrant.

COUNTY OF —.

The People of the State of California, to any Sheriff, Constable, Marshal, or Policeman in this State:

A. B., having been on the — day of —, A. D. eighteen hundred and —, duly convicted in the County Court (or District Court, or Municipal Court, as the case may be) of the County of —, of the crime of — (designating it generally), you are therefore commanded forthwith to arrest the above named A. B., and bring him before that Court for judgment; or if the Court has adjourned for the term, that you deliver him into the custody of the Sheriff of the County of —.

Given under my hand, with the seal of said Court affixed, this — day of — A. D. eighteen hundred and —.

By order of the Court.

[SEAL.]

E. F., Clerk.

NOTE.—Stats. 1863, p. 161, Sec. 18.

Warrant,
how served

1198. (§ 454.) The bench warrant may be served in any county in the same manner as a warrant of arrest, except that when served in another county it need not be indorsed by a magistrate of that county.

Arrest of
defendant.

1199. (§ 455.) Whether the bench warrant is served in the county in which it was issued or in another county, the officer must arrest the defendant and bring him before the Court or commit him to the officer mentioned in the warrant, according to the command thereof.

Arraign-
ment of de-
fendant for
judgment.

1200. (§ 456.) When the defendant appears for judgment he must be informed by the Court, or by the Clerk, under its direction, of the nature of the indictment and of his plea, and the verdict, if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him.

What
cause may
be shown
against the
judgment.

1201. (§ 457.) He may show, for cause against the judgment:

1. That he is insane; and if, in the opinion of the Court, there is reasonable ground for believing him to be insane, the question of insanity must be tried as provided in Chapter VI, Title X, Part II of this Code. If, upon the trial of that question, the jury find that he is sane, judgment must be pronounced, but if they find him insane, he must be committed to the State Lunatic Asylum until he becomes sane; and when notice is given of that fact, as provided in Section 1372, he must be brought before the Court for judgment;

2. That he has good cause to offer, either in arrest

of judgment or for a new trial; in which case the Court may, in its discretion, order the judgment to be deferred, and proceed to decide upon the motion in arrest of judgment or for a new trial.

1202. (§ 458.) If no sufficient cause is alleged or appears to the Court why judgment should not be pronounced, it must thereupon be rendered.

If no cause shown, judgment to be pronounced.

NOTE.—After sentence, but before the judgment is signed, it may be amended by shortening the time.—People vs. Thompson, 4 Cal., p. 238. If the indictment charges more than one offense in separate counts, and the verdict is general, the presumption will be that the Judge who tried the case pronounced judgment for the offense to which the evidence was directed.—People vs. Shotwell, 27 Cal., p. 394. A judgment that the defendant be imprisoned for a specified term, “to commence at the expiration of previous sentences,” is valid.—People vs. Forbes, 22 Cal., p. 135. So, too, is a judgment “that the defendant be imprisoned in the State Prison for the term of three years from the date of his incarceration.”—People vs. King, 28 Cal., p. 265. Or that the defendant “be imprisoned four years from the time of his delivery to the Warden,” etc.—People vs. Hughes, 29 Cal., p. 257. An error which will render a judgment *voidable* only is the want of adherence to some prescribed mode of proceeding in conducting the action or defense. An error which renders a judgment *void* is such an illegality as is contrary to the principles of law as distinguished from rules of procedure.—Ex Parte Gibson, 31 Cal., p. 619. A judgment upon a conviction of misdemeanor which adjudges the defendant to be imprisoned in the State Prison, is void.—Ex Parte Cha, 40 Cal., p. 426. Judgments of inferior criminal Courts are not required to be in a different form from those of like Courts of general jurisdiction.—People vs. Forbes, 22 Cal., p. 135.

1203. After a plea or verdict of guilty, where a discretion is conferred upon the Court as to the extent of the punishment, the Court, upon the oral suggestion of either party that there are circumstances which may be properly taken into view either in aggravation or mitigation of the punishment, may, in its discretion,

Court may summarily inquire into circumstances in aggravation or mitigation of punishment.

hear the same summarily, at a specified time, and upon such notice to the adverse party as it may direct.

NOTE.—The provisions of this and the succeeding section are intended to regulate the practice in relation to the subject embraced therein, and sufficiently explain themselves. They also perform another office. A violation of either section is punished as a misdemeanor (Sec. 166, Subd. 8, of this Code), and thereby all *extra judicial* influences prevented.

Proof of former conviction or of facts, etc., in mitigation, etc., how made.

1204. The circumstances must be presented by the testimony of witnesses examined in open Court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county, out of Court, upon such notice to the adverse party as the Court may direct. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the Court, or a Judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section.

NOTE.—See note to preceding section, and also Sec. 166 of this Code.

Duration of imprisonment on judgment to pay a fine

1205. A judgment that the defendant pay a fine I may also direct that he be imprisoned until the fine be t satisfied, specifying the extent of imprisonment, which c must not exceed one day for every dollar of the fine.

c For the crime of an assault, the defendant may be fined not exceeding five hundred dollars, and may be adjudged to pay the costs, and may be imprisoned for the fine, but not for the costs. *Petty v. Co. of San Joaquin*, 45 Cal. 245. The fees of a reporter are not to be taxed as costs. *Id.*

each day he may remain in prison, and may at any time pay the sum remaining due and claim his discharge.—*Ex Parte Kelly*, 28 Cal., p. 414.

Judgment to pay a fine constitutes a lien.

1206. (§ 461.) A judgment that the defendant pay a fine constitutes a lien, in like manner as a judgment for money rendered in a civil action.

Entry of judgment and judgment roll.

~~1207. (§ 462.) When judgment upon a conviction is rendered, the Clerk must enter the same upon the~~

1207. When judgment upon a conviction is rendered, the clerk must enter the same in the minutes, stating briefly the offense for which the conviction was had, and the fact of a prior conviction (if one), and must, within five days, annex together and file the following papers, which will constitute a record of the action:

1. The indictment and a copy of the minutes of the plea or demurrer;
2. A copy of the minutes of the trial;
3. The charges given or refused, and the indorsements thereon; and
4. A copy of the judgment.

This section refers to written charges or instructions which either party may present, and ask to be given, and not to the charge which the Court may give on its own motion. *People v. Hart*, 44 Cal. 598.

- ~~4. A copy of the minutes of the trial;~~
- ~~5. A copy of the minutes of the judgment;~~
- ~~6. The bill of exceptions, if there be one;~~
- ~~7. The written charges asked of the Court, and refused, if there be any;~~
8. A copy of all charges given and of the indorsements thereon.

NOTE.—FORM OF JUDGMENT.—The judgment entered in the minutes is sufficient, if it states of what offense the defendant was finally convicted and the penalty imposed. It need not recite the facts contained in the other papers constituting the record in the action.—*In Re Edward Ring*, 28 Cal., p. 247. The judgment is not *void* because it does not state the offense of which the prisoner was convicted, if it shows that he was indicted for some offense and tried and convicted, and that the sentence passed on him was one which the Court had jurisdiction to pronounce for some offense of which he might have been convicted under the indictment.—*Ex Parte Gibson*, 31 Cal., p. 619. Under Section 462 of the old Criminal Practice Act, the charges given by the Court did not form part of the judgment roll.—*People vs. Hart*, October Term, 1872.

CHAPTER II.

THE EXECUTION.

SECTION 1213. Authority for the execution of a judgment, other than of death.

1214. If for fine alone, execution to issue as in civil cases.

1215. Judgment of fine and imprisonment, by whom and how executed.

1216. Duty of Sheriff on receiving copy of judgment of imprisonment.

1217. Warrant of execution upon judgment of death. Time of execution.

1218. Judge to transmit statement of conviction and testimony to Governor.

1219. Governor may require opinion of Justices of Supreme Court, etc., thereon.

1220. Judgment of death, when suspended.

1221. If reason to suppose defendant insane, jury to inquire into it; how and by whom ordered.

1222. Duty of District Attorney upon inquisition.

1223. Inquisition, how certified and filed.

1224. Proceedings upon finding of jury.

1225. Proceedings when female is supposed to be pregnant.

1226. Proceedings upon the finding of the jury.

1227. Proceedings when judgment of death remaining in force has not been executed.

1228. Punishment of death, how inflicted.

1229. Execution, where to take place and who to be present.

1230. Return upon death warrant.

Authority
for the exe-
cution of a
judgment,
other than
of death.

1213. (§ 463.) When a judgment, other than of death, has been pronounced, a certified copy of the entry thereof upon the minutes must be forthwith furnished to the officer whose duty it is to execute the judgment, and no other warrant or authority is necessary to justify or require its execution.

NOTE.—No other authority for the detention of a prisoner is required than a certified copy of the judgment rendered against him.—In *Re Brown*, 32 Cal., p. 48; In *Re Ring*, 28 Cal., p. 247; *Ex Parte Gibson*, 31 Cal., p. 619. A commitment which does not contain a copy of the judgment entered in the minutes, but merely recites the history of the action and the proceedings therein, is not sufficient authority for the detention of a prisoner.—*Ex Parte Dobson*, 31 Cal., p. 497; *Ex Parte Gibson*, 31 Cal., p. 619.

1214. (§ 464.) If the judgment is for a fine alone, execution may be issued thereon as on a judgment in a civil action.

If for fine alone, execution to issue as in civil cases.

NOTE.—Stats. 1851, p. 212; see, also, Sec. 1206 of this Code.

1215. (§ 465.) If the judgment is for imprisonment, or a fine, and imprisonment until it be paid, the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment is complied with.

Judgment of fine and imprisonment, by whom and how executed.

NOTE.—See Sec. 1205 of this Code, and note.

1216. If the judgment is for imprisonment in the State Prison, the Sheriff of the county must, upon receipt of a certified copy thereof, take and deliver the defendant to the Warden of the State Prison. He must also deliver to the Warden the certified copy of the judgment, and take from the Warden a receipt for the defendant.

Duty of Sheriff on receiving copy of judgment of imprisonment.

NOTE.—Stats. 1856, p. 226, Sec. 2; see note to Sec. 1213 of this Code.

1217. (§ 466.) When judgment of death is rendered, a warrant, signed by the Judge, and attested by the Clerk under the seal of the Court, must be drawn and delivered to the Sheriff. It must state the conviction and judgment, and appoint a day on which the judgment is to be executed, which must not be less than thirty nor more than sixty days from the time of judgment.

Warrant of execution upon judgment of death.

Time of execution.

NOTE.—The practice of designating, in a judgment of death, a day for carrying it into effect, is not in keeping with this provision. The day should be designated in the warrant, but not in the judgment.—People vs. Bonilla, 38 Cal., p. 699; People vs. Murphy, April Term, 1872. If the judgment of death be not executed on the day appointed, it is competent for the Court rendering the judgment to appoint another day for carrying it into execution.—People vs. Bonilla, 38 Cal., p. 699.

1217. The day for carrying into effect the sentence of death should not be designated in the judgment, but in the warrant for the execution. People v. Murphy, 45 Cal. 137.

Judge to
transmit
statement
of conviction
and testimony
to Governor

1218. (§ 467.) The Judge of the Court at which a conviction requiring judgment of death is had, must, immediately after the conviction, transmit to the Governor, by mail or otherwise, a statement of the conviction and judgment, and of the testimony given at the trial.

Governor
may
require
opinion of
Justices of
Supreme
Court, etc.,
thereon.

1219. (§ 468.) The Governor may thereupon require the opinion of the Justices of the Supreme Court and of the Attorney General, or any of them, upon the statement so furnished.

Judgment
of death,
when
suspended.

1220. (§ 469.) No Judge, Court, or officer, other than the Governor, can suspend the execution of a judgment of death, except the Sheriff, as provided in the six succeeding sections, unless an appeal is taken.

If reason to
suppose
defendant
insane,
jury to
inquire into
it; how and
by whom
ordered.

1221. (§ 470.) If, after judgment of death, there is good reason to suppose that the defendant has become insane, the Sheriff of the county, with the concurrence of the Judge of the Court by which the judgment was rendered, may summon from the list of jurors selected by the Supervisors for the year a jury of twelve persons to inquire into the supposed insanity, and must give immediate notice thereof to the District Attorney of the county.

Duty of
District
Attorney
upon
inquisition

1222. (§ 471.) The District Attorney must attend the inquisition, and may produce witnesses before the jury, for which purpose he may issue process in the same manner as for witnesses to attend before the Grand Jury, and disobedience thereto may be punished in like manner as disobedience to process issued by the Court.

Inquisition,
how
certified
and filed.

1223. (§ 472.) A certificate of the inquisition must be signed by the jurors and the Sheriff and filed with the Clerk of the Court in which the conviction was had.

1224. (§§ 473, 474.) If it is found by the inquisition that the defendant is sane, the Sheriff must execute the judgment; but if it is found that he is insane, the Sheriff must suspend the execution of the judgment until he receives a warrant from the Governor or from the Judge of the Court by which the judgment was rendered directing the execution of the judgment. If the inquisition finds that the defendant is insane, the Sheriff must immediately transmit it to the Governor, who may, when the defendant becomes sane, issue a warrant appointing a day for the execution of the judgment.

Proceedings upon finding of jury.

1225. (§ 475.) If there is good reason to suppose that a female against whom a judgment of death is rendered is pregnant, the Sheriff of the county, with the concurrence of the Judge of the Court by which the judgment was rendered, may summon a jury of three physicians to inquire into the supposed pregnancy. Immediate notice thereof must be given to the District Attorney of the county, and the provisions of Sections 1222 and 1223 apply to the proceedings upon the inquisition.

Proceedings when female is supposed to be pregnant.

1226. (§§ 476, 477.) If it is found by the inquisition that the female is not pregnant, the Sheriff must execute the judgment; if it is found that she is pregnant, the Sheriff must suspend the execution of the judgment, and transmit the inquisition to the Governor. When the Governor is satisfied that the female is no longer pregnant, he may issue his warrant appointing a day for the execution of the judgment.

Proceedings upon the finding of the jury.

1227. (§§ 478, 479.) If for any reason a judgment of death has not been executed and it remains in force, the Court in which the conviction was had, on the application of the District Attorney, must order the defendant to be brought before it, or, if he is at large, a warrant for his apprehension may be issued. Upon

Proceedings when judgment of death remaining in force has not been executed.

the defendant being brought before the Court it must inquire into the facts, and if no legal reasons exist against the execution of the judgment, must make an order that the Sheriff execute the judgment at a specified time. The Sheriff must execute the judgment accordingly.

Punish-
ment of
death, how
inflicted.

1228. (§ 480.) The punishment of death must be inflicted by hanging the defendant by the neck until he is dead.

NOTE.—Stats. 1851, p. 212.

Execution,
where to
take place
and who to
be present.

1229. A judgment of death must be executed within the walls or yard of a jail, or some convenient private place in the county. The Sheriff of the county must be present at the execution, and must invite the presence of a physician, the District Attorney of the county, and at least twelve reputable citizens, to be selected by him; and he shall, at the request of the defendant, permit such ministers of the gospel, not exceeding two, as the defendant may name, and any persons, relatives or friends, not to exceed five, to be present at the execution, together with such peace officers as he may think expedient, to witness the execution. But no other persons than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness the same.

NOTE.—Founded upon the Act to abolish public executions. (Stats. 1858, p. 192, Sec. 1.)

Return
upon death
warrant.

1230. After the execution, the Sheriff must make a return upon the death warrant, showing the time, mode, and manner in which it was executed.

NOTE.—Stats. 1858, p. 192, Sec. 3.

TITLE IX.

OF APPEALS TO THE SUPREME COURT.

CHAPTER I. *Appeals, when allowed and how taken, and the effect thereof.*

II. *Dismissing an appeal for irregularity.*

III. *Argument of the appeal.*

IV. *Judgment upon appeal.*

CHAPTER I.

APPEALS, WHEN ALLOWED AND HOW TAKEN, AND THE EFFECT THEREOF.

SECTION 1235. Who may appeal. Appeal to be taken on questions of law alone.

1236. Parties, how designated on appeal.

1237. In what cases an appeal may be taken by the defendant.

1238. In what cases by the people.

1239. Appeals, within what time to be taken.

1240. Appeal, how taken.

1241. When notice may be served by publication.

1242. Effect of an appeal by the people.

1243. Effect of an appeal by the defendant.

1244. Same.

1245. Same.

1246. Duty of Clerks upon appeal.

1235. (§§ 481, 482.) Either party in a criminal action amounting to a felony may appeal to the Supreme Court, on questions of law alone, as prescribed in this Chapter.

Who may
appeal.
Appeal to
be taken on
questions
of law
alone.

NOTE.—As to the jurisdiction of the Supreme Court on appeal in criminal cases, see note to Sec. 44 of the Code of Civil Procedure.

1236. (§ 483.) The party appealing is known as the appellant, and the adverse party as the respondent, but the title of the action is not changed in consequence of the appeal.

Parties,
how
designated
on appeal.

1235. An order of a County Court, directing that a criminal charge ignored by one Grand Jury be submitted to another, is not an appealable order. *People v. Clark*, 42 Cal. 623. Any error committed by the Court in setting aside or modifying an erroneous order, may be reviewed in a proper case upon appeal, but cannot be questioned upon

In what
cases an
appeal may
be taken
by the
defendant.

1237. (§ 481.) An appeal may be taken by the defendant:

1. From a final judgment of conviction;
2. From an order denying a motion for a new trial;
3. From any order made after judgment, affecting the substantial rights of the party.

NOTE.—See note to Sec. 1238 of this Code.

In what
cases by
the people.

1238. (§ 481.) An appeal may be taken by the people:

1. From a judgment for the defendant on a demurrer to the indictment;
2. From an order granting a new trial;
3. From an order arresting judgment;
4. From any order made after judgment, affecting the substantial rights of the people.

NOTE.—People vs. Ah Kim, April Term, 1872. This Chapter is founded upon Sections 481–492, inclusive, of the Criminal Practice Act of 1851, and the amendments thereto of 1858, 1862, and 1863 (Stats. 1858, p. 217; 1862, p. 536; 1863, p. 158); but has been framed so as to include only appeals to the Supreme Court, appeals to the County Court being provided for in Title XI, Chapter II. By the *terms* of the statute, as it stood, the right of appeal was as broad in favor of the people as of the defendant, in a criminal action. The validity of these provisions were involved in the decision of the case of The People vs. Webb, 38 Cal., p. 467. The defendant had been indicted and tried for perjury. Upon the trial in the Court below, the people offered in evidence the record of the proceedings in which the alleged perjury was committed. The Court, upon the objection of the defendant, improperly excluded the record. As it constituted the foundation of the people's proofs, its exclusion ended their case, and the defendant was acquitted. From the judgment of acquittal the people appealed, assigning the erroneous ruling as error, and it would have followed, if the *terms* of the statute were to be the guide, that the judgment must be reversed and the cause remanded for a new trial. In the appellate Court the defendant confessed the error, but invoked the aid of the constitutional provision, that "No person shall be subject to be twice put in jeopardy for the same offense." Justice Sprague,

delivering the opinion of the Court (Sanderson, J., expressing no opinion, though it is not so stated in the reported case), after an able and elaborate view of the authorities, said: "We are therefore of opinion that under our Constitution, which protects a party from a second jeopardy of life, limb, liberty, or property, for the same public offense, whatever its grade, a person once placed upon his trial before a competent Court and jury, charged with his case upon a valid indictment, is in jeopardy in the sense of the Constitution, unless such jury be discharged without rendering a verdict, from a legal necessity, or for cause beyond the control of the Court, such as death, sickness, or insanity of some one of the jury, the prisoner, or the Court, or by consent of the prisoner; and if such jury render a verdict, or be discharged before a verdict, without such legal necessity, controlling cause, or consent, the prisoner is forever protected from a retrial upon the same or any other indictment for the same offense, unless, at his instance, the verdict be set aside, or judgment be reversed; and, further, that the correct interpretation of our statute, giving to the prosecutor a right to his bill of exceptions and appeal, when construed with reference to this provision of the Constitution, must be understood to have reference to such errors only as may occur in the proceedings before the legal jeopardy attaches. With these views, it follows that a reversal of the judgment in the present case would be vain and useless, as we are not authorized to direct or order a retrial." The Commissioners have modified the language of the provisions in question, to accord with this authoritative construction. No *appeal* lies from an order, directing a charge, once ignored, to be resubmitted to another Grand Jury. The only orders from which appeals lie are orders made after final judgment; orders before that are only reviewed on appeal from a final judgment, or an order granting or refusing a new trial.—People vs. Clarke, January Term, 1872 (No. 3101.) No appeal lies from an order of a Judge, admitting a party to bail under the provisions of the Title relating to habeas corpus (Sec. 1490 et seq., post.) People vs. Schuster, 40 Cal., p. 627. An order, sustaining a demurrer, is a final judgment from which an appeal will lie.—People vs. Ah Own, 39 Cal., p. 604.

1239. (§ 485.) An appeal from a judgment must be taken within one year after its rendition, and from an order, within sixty days after it is made.

Appeals,
within
what time
to be taken.

Appeal,
how taken.

1240. (§§ 486, 487, 488.) An appeal is taken by filing with the Clerk of the Court in which the judgment or order appealed from is entered or filed, a notice stating the appeal from the same, and serving a copy thereof upon the attorney of the adverse party.

NOTE.—This section is such a departure from Sec. 488 of the Criminal Practice Act as will avoid the rule laid down in *People vs. Wallace*, 23 Cal., p. 93. When no notice of *appeal* is given, or no record that any was given, appears to the Supreme Court, the case will be stricken from the calendar, there being no appeal taken.—*People vs. Pico*, January Term, 1872 (No. 3017).

When
notice may
be served
by publica-
tion.

1241. (§§ 488, 489.) If personal service of the notice cannot be made, the Judge of the Court in which the action was tried, upon proof thereof, may make an order for the publication of the notice in some newspaper for a period not exceeding thirty days; such publication is equivalent to personal service.

Effect of an
appeal by
the people.

1242. (§ 490.) An appeal taken by the people in no case stays or affects the operation of a judgment in favor of the defendant, until judgment is reversed.

Effect of an
appeal by
the
defendant.

1243. An appeal to the Supreme Court from a judgment of conviction stays the execution of the judgment in all capital cases, and in all other cases, upon filing with the Clerk of the Court in which the conviction had, a certificate of the Judge of such Court, or of the justice of the Supreme Court, that, in his opinion, there is probable cause for the appeal, but not other-

*there
wise*

missioners incorporated in the Code, at the suggestion of Justice Wallace. Prior to the adoption of the Code the judgment, unless it imposed a fine only, might be executed pending an appeal; and perhaps save in the case mentioned, and upon a judgment in a capital case, there was no power in the Court to stay the execution of a judgment pending the appeal, unless in the cases in which bail might be taken and the defendant

had the ability to give it. Said Justice Wallace, in *Ex Parte Hoge*, on habeas corpus (a decision which has never been published save in this Code—see note to Sec. 1272, post): “The right to appeal to the Supreme Court is guaranteed by the Constitution, and is as sacred as the right of trial by jury. It is one of the means the law has provided to determine the question of his guilt or innocence. Upon such an appeal the ultimate question is nearly always as to the validity of the judgment under which the prisoner is to suffer; and it is certainly not consonant to our ideas of justice, if it can be prevented by legal means, that even while the question of guilt or innocence is yet being agitated in the form of an appeal, the prisoner should be undergoing the very punishment and suffering the very infamy which it was the lawful purpose of the appeal to avert.” It would be somewhat akin to a practice of punishing the accused for his alleged offense while the jury was deliberating upon the verdict.” *Hoge’s case* illustrates the evil of the rule existing prior to the Code. No Court could have stayed the execution of the sentence. Yet upon the appeal the judgment was reversed from the bench. The defendant was admitted to bail pending the appeal, and thus the punishment was averted; but whether it could be averted or not depended solely upon his ability or non-ability to give bail. The law discriminated in favor of the rich and influential, and against the poor and friendless. Under the provisions of Secs. 1243, 1244, and 1245 every appeal taken in good faith will have the effect of suspending the judgment pending the appeal, the prisoner remaining in the custody of the Sheriff in cases in which the offense is bailable, or in which, if bailable, the prisoner is unable to give bail.

1244. If the certificate provided for in the preced *same.*
ing section is filed, the Sheriff must, if the defendant be in his custody, upon being served with a copy thereof, keep the defendant in his custody without executing the judgment, and detain him to abide the judgment on appeal.

NOTE.—See note to Sec. 1243 of this Code.

1245. If, before the granting of the certificate, the *same.*
judgment has commenced, the further execution thereof is suspended, and upon service of a copy of such cer-

tificate the defendant must be restored, by the officer in whose custody he is, to his original custody.

NOTE.—See note to Sec. 1243 of this Code.

Duty of
Clerks
upon
appeal.

1246. (§ 492.) Upon the appeal being taken, the Clerk with whom the notice of appeal is filed must, within ten days thereafter, without charge, transmit to the Clerk of the appellate Court a copy of the notice of appeal and of the record, and of all bills of exception, instructions, and indorsements thereon; and upon the receipt thereof the Clerk of the appellate Court must file the same and perform the same service as in civil cases, without charge.

NOTE.—People vs. Myers, 20 Cal., p. 76.

TRANSCRIPT ON APPEAL.—People vs. Martin, 32 Cal., p. 91. After the transcript on appeal has been filed in the Supreme Court, it will not be sent back in order that the statement or bill of exceptions may be changed by resettlement, except upon proof or admission of the mistake or omission.—People vs. Romero, 18 Cal., p. 89.

CHAPTER II.

DISMISSING AN APPEAL FOR IRREGULARITY.

SECTION 1248. For what irregularity, and how dismissed.

1249. Dismissal for want of a return.

For what
irregu-
larity, and
how
dismissed.

1248. (§ 493.) If the appeal is irregular in any substantial particular, but not otherwise, the appellate Court may, on any day in term, on motion of the respondent, upon five days notice, accompanied with copies of the papers upon which the motion is founded, order it to be dismissed.

Dismissed
for want
of a return.

1249. (§ 494.) The Court may also, upon like motion, dismiss the appeal, if the return is not made as provided in Section 1246, unless for good cause they enlarge the time for that purpose.

CHAPTER III.

ARGUMENT OF THE APPEAL.

SECTION 1252. Appeals, when to be heard and determined.

1253. Judgment may be affirmed, but cannot be reversed without argument.

1254. Number of counsel to be heard.

1255. Defendant need not be present.

1252. (§ 495.) All appeals in criminal cases must be heard and determined at the first term of the appellate Court after the record is filed.

Appeals,
when to be
heard and
determined

1253. (§ 496.) The judgment may be affirmed if the appellant fail to appear, but can be reversed only after argument, though the respondent fail to appear.

Judgment
may be
affirmed,
but cannot
be reversed
without
argument.

1254. (§ 497.) Upon the argument of the appeal, if the offense is punishable with death, two counsel must be heard on each side, if they require it. In any other case the Court may, in its discretion, restrict the argument to one counsel on each side.

Number of
counsel to
be heard.

NOTE.—Stats. 1854, p. 81, Sec. 5.

1255. (§ 498.) The defendant need not personally appear in the appellate Court.

Defendant
need not be
present.

CHAPTER IV.

JUDGMENT UPON APPEAL.

SECTION 1258. Court to give judgment without regard to technical errors.

1259. What may be reviewed on an appeal by defendant from a judgment.

1260. May reverse, affirm, or modify the judgment, and order new trial.

1261. New trial, where to be had.

1262. Defendant, when to be discharged on reversal of judgment.

1263. Judgment to be executed on affirmance.

SECTION 1264. Judgment of appellate Court, how entered and remitted.

1265. Jurisdiction of appellate Court ceases after judgment remitted.

Court to
give
judgment
without
regard to
technical
errors.

1258. (§ 499.) After hearing the appeal, the Court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties.

X NOTE.—A judgment will not be disturbed on account of an erroneous instruction which was not applicable to the facts of the case.—*People vs. March*, 6 Cal., p. 543. A judgment will not be reversed by reason of errors which do not affect the substantial rights of the parties. *People vs. Cronin*, 34 Cal., p. 191; *People vs. Dick*, 32 Cal., p. 213.

What may
be
reviewed
on an
appeal by
defendant
from a
judgment.

1259. (§ 484.) Upon an appeal taken by the defendant from a judgment, the Court may review any intermediate order or ruling involving the merits, or which may have affected the judgment.

NOTE.—*People vs. Clark*, January Term, 1872. Motions for continuance are subject to review on an appeal from the judgment.—*People vs. Diaz*, 6 Cal., p. 248.

May
reverse,
affirm, or
modify the
judgment,
and order
new trial.

1260. (§ 500.) The Court may reverse, affirm, or modify the judgment or order appealed from, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependant upon, such judgment or order, and may, if proper, order a new trial.

NOTE.—ERROR MUST AFFIRMATIVELY APPEAR, or the Court will not reverse the judgment.—*People vs. King*, 27 Cal., p. 507; *People vs. Levison*, 16 Cal., p. 98; *People vs. Bonney*, 19 Cal., p. 426; *People vs. Connor*, 17 Cal., p. 214; *People vs. Robinson*, 17 Cal., p. 363; *People vs. Bealota*, 17 Cal., p. 389; *People vs. Lafuente*, 6 Cal., p. 202.

ERROR IN INSTRUCTIONS.—Errors in instructions will not be reviewed, unless the instructions are embodied in a bill of exceptions, or there is an indorsement thereon, signed by the Judge showing the action of the Court.—*People vs. Thompson*, 28 Cal., p. 214; *People vs. Tetheron*, 40 Cal., p. 286; see, also, cases cited, *supra*. A mere want of perspicuity in an instruction which does not injure the prisoner will not authorize a reversal of the judgment.—*People vs.*

Moore, 8 Cal., p. 90. If the Court below, in the instructions, assumes a certain state of facts, which facts show the applicability of the instructions, the appellate Court will review the action of the Court below, without any evidence being embodied in the record.—People vs. Dick, 32 Cal., p. 213. And so, too, when the action of the Court below is erroneous under any possible state of facts.—People vs. Dick, 32 Cal., p. 213. The record of the trial need not affirmatively show that the instructions were given in writing; the presumption is that they were so given.—People vs. Chung Lit, 17 Cal., p. 320.

APPEALS FROM ORDERS GRANTING OR REFUSING NEW TRIALS.—The question whether a defendant in a criminal case is entitled to a new trial, on the ground that the verdict is contrary to evidence, is one of law, and not one of fact, within the meaning of Sec. 4 of Article VI of the State Constitution.—People vs. Jones, 31 Cal., p. 565. The general rule is that the Court will not review on appeal an order refusing a new trial, moved for on the ground that the verdict is against evidence, unless the record contains a statement setting forth the material portions of the testimony. But if the record states that it gives "in substance all that was proven on the part of the State," it is sufficient. The facts as proved being given obviates the necessity of setting out the testimony.—People vs. York, 9 Cal., p. 421. If a verdict finding the accused guilty is not clearly sustained by the evidence the judgment will be reversed.—People vs. Lewis, 36 Cal., p. 531. On an appeal from an order granting a new trial the appellate Court is confined to a review of the proceedings between issue joined and the rendition of the verdict.—People vs. Turner, 39 Cal., p. 370.

POINTS RAISED FOR THE FIRST TIME.—If the record discloses the fact that a written instrument introduced in evidence in the Court below was a forgery, the point may be raised for the first time in the Supreme Court.—Fuller vs. Furgeson, 26 Cal., p. 546. Objections to an indictment on the ground of omission of certain words, or of uncertainty in the form of an indictment, cannot be raised for the first time in the Supreme Court.—People vs. Gatewood, 20 Cal., p. 146.

GENERALLY.—The appellate Court will not reverse a judgment by reason of an alleged error in a proceeding had on the trial by express agreement of the defendant and his counsel, unless bound so to do by some controlling rule of law.—People vs. Henderson, 28 Cal., p. 465. Yc Cow is indicted; Ah Cow arraigned. Ey

Chow demands a separate trial, and the verdict is against Ah Cow. *Held*, that the record is wanting in certainty.—*People vs. Ah Cow*, 17 Cal., p. 101. In a criminal case, on appeal, the stipulations of the attorneys cannot be substituted for the certificate of the Judge to the bill of exceptions.—*People vs. Trim*, 37 Cal., p. 274. The action of the Court below on motion to set aside the indictment, or on demurrer, can only be reviewed on an appeal from the judgment.—*People vs. Turner*, 39 Cal., p. 370. The notes of evidence taken by the shorthand reporter must be written out and authenticated by his certificate.—*People vs. Tetheron*, 40 Cal., p. 286.

New trial,
where to be
had.

1261. (§ 501.) When a new trial is ordered it must be directed to be had in the Court of the county from which the appeal was taken.

Defendant,
when to be
discharged
on reversal
of
judgment.

1262. (§ 502.) If a judgment against the defendant is reversed without ordering a new trial, the appellate Court must, if he is in custody, direct him to be discharged therefrom; or if on bail, that his bail be exonerated; or if money was deposited instead of bail, that it be refunded to the defendant.

Judgment
to be
executed
on
affirmance.

1263. (§ 503.) If a judgment against the defendant is affirmed, the original judgment must be enforced.

Judgment
of
appellate
Court, how
entered
and
remitted.

1264. (§ 504.) When the judgment of the appellate Court is given, it must be entered in the minutes, and a certified copy of the entry forthwith remitted to the Clerk of the Court from which the appeal was taken.

NOTE.—Stats. 1851, p. 212.

Jurisdiction
of
appellate
Court
ceases after
judgment
remitted.

1265. (§ 506.) After the certificate of the judgment has been remitted to the Court below the appellate Court has no further jurisdiction of the appeal or of the proceedings thereon, and all orders necessary to carry the judgment into effect must be made by the Court to which the certificate is remitted.

NOTE.—*People vs. Bonilla*, 38 Cal., p. 699. The mode of executing judgments in criminal cases is pre-

scribed by statute. Upon the affirmance of an order or judgment no order of the appellate Court directing the Court below to enforce the judgment is necessary.—*People vs. Dick*, 39 Cal., p. 102.

TITLE X.

MISCELLANEOUS PROCEEDINGS.

CHAPTER I. *Bail.*

- II. *Who may be witnesses in criminal actions.*
- III. *Compelling the attendance of witnesses.*
- IV. *Examination of witnesses conditionally.*
- V. *Examination of witnesses on commission.*
- VI. *Inquiry into the insanity of the defendant before trial or after conviction.*
- VII. *Compromising certain public offenses by leave of the Court.*
- VIII. *Dismissal of the action, before or after indictment, for want of prosecution or otherwise.*
- IX. *Proceedings against corporations.*
- X. *Entitling affidavits.*
- XI. *Errors and mistakes in pleadings and other proceedings.*
- XII. *Disposal of property stolen or embezzled.*
- XIII. *Reprieves, commutations, and pardons.*

CHAPTER I.

BAIL.

ARTICLE I. IN WHAT CASES THE DEFENDANT MAY BE ADMITTED TO BAIL.

- II. BAIL UPON BEING HELD TO ANSWER BEFORE INDICTMENT.

ARTICLE III. BAIL UPON AN INDICTMENT BEFORE CONVICTION.

IV. BAIL ON APPEAL.

V. DEPOSIT INSTEAD OF BAIL.

VI. SURRENDER OF THE DEFENDANT.

VII. FORFEITURE OF THE UNDERTAKING OF BAIL OR OF THE DEPOSIT OF MONEY.

VIII. RECOMMITMENT OF THE DEFENDANT AFTER HAVING GIVEN BAIL OR DEPOSITED MONEY INSTEAD OF BAIL.

ARTICLE I.

IN WHAT CASES THE DEFENDANT MAY BE ADMITTED TO BAIL.

SECTION 1268. Admission to bail defined.

1269. Taking of bail defined.

1270. Offense not bailable.

1271. In what cases defendant may be admitted to bail before conviction.

1272. In what cases he may be admitted to bail after conviction and upon appeal.

1273. Nature of bail.

1274. When bail is matter of discretion, notice of application must be given to District Attorney.

Admission
to bail
defined.

1268. (§ 507.) Admission to bail is the order of a competent Court or magistrate that the defendant be discharged from actual custody upon bail.

Taking of
bail defined

1269. (§ 508.) The taking of bail consists in the acceptance, by a competent Court or magistrate, of the undertaking of sufficient bail for the appearance of the defendant, according to the terms of the undertaking, or that the bail will pay to the people of this State a specified sum.

Offense not
bailable.

1270. (§ 510.) A defendant charged with an offense punishable with death cannot be admitted to bail, when the proof of his guilt is evident or the presumption thereof great. The finding of an indictment does not add to the strength of the proof or the presumptions to be drawn therefrom.

NOTE.—The admission to bail in capital cases, where the proof is evident or the presumption great, may be

made under Art. I, Sec. 5, of our Constitution, matter of discretion, or may be forbidden by the Legislature. In all other cases the admission to bail is a right of the accused which no Judge or Court can properly refuse.—People vs. Tinder, 19 Cal., p. 539. In The People vs. Tinder, supra, it was also held that an indictment for a capital offense of itself furnished a presumption of guilt too great to entitle the defendant to bail as matter of right under the Constitution, or as matter of discretion under the then existing legislation of the State; that the indictment created a presumption of guilt for all purposes except a trial before a petit jury. To obviate the effect of the decision in that respect the last clause of Sec. 1270 was added to the original section (510) of the Criminal Practice Act.

1271. (§ 509.) If the charge is for any other offense, he may be admitted to bail before conviction, as a matter of right.

In what cases defendant may be admitted to bail before conviction.

NOTE.—Stats. 1863, p. 151; People vs. Tinder, 19 Cal., p. 539.

1272. (§ 512.) After conviction of an offense not punishable with death, a defendant who has appealed may be admitted to bail:

In what cases he may be admitted to bail after conviction and upon appeal.

1. As a matter of right, when the appeal is from a judgment imposing a fine only;
2. As a matter of discretion in all other cases.

NOTE.—People vs. Voll, Sup. Ct. Cal., 1871. The following opinion of Mr. Justice Wallace, discussing some of the questions involved in this section, was delivered in San Francisco in November, 1871. It has never before been published:

Ex Parte George Hoge, upon habeas corpus.—The petitioner, lately under indictment for an assault with a deadly weapon, alleged to have been made upon one Dwyer with intent to murder him, was, upon trial in the Municipal Criminal Court, found guilty of an assault made with a deadly weapon, with intent to do a bodily injury. The punishment provided by statute for this last offense is a fine or imprisonment, or both. Upon this conviction the Municipal Court adjudged him to suffer imprisonment in the State Prison for the term of eighteen months, and from this judgment he has appealed to the Supreme Court. Upon taking his appeal, he applied to the Judge of the Municipal Court to be

admitted to bail pending the appeal, and his application was refused. It is understood that the learned Judge, in thus refusing the application, did not maintain that the prisoner might not lawfully be admitted to bail pending the appeal, but, holding that the prisoner had no *absolute* right to go at large upon bail after conviction, the Judge was further of opinion that it would be more appropriate that the mere discretion to admit him to bail, under the circumstances, should be exercised by the Supreme Court, to which the appeal had been taken, or by some one of its Justices. The counsel for the petitioner, in the argument upon the hearing before me, insisted that as the prisoner is not charged with a capital offense, he has an absolute constitutional right to be at large upon bail pending the appeal; and that upon the fact of his conviction for this offense, minor in its character, and upon the further fact of an appeal having been taken from the judgment, it is my bounden duty to admit him to bail, and that I have under these circumstances no discretion to refuse the application. In support of this proposition the counsel cited Section 7, Article I, of the Constitution of the State, and which is in the following words: "All persons shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident or the presumption great."

The argument is, that it was the evident purpose of the framers of the Constitution to abrogate that somewhat unbounded discretion which the Judges are known to have exercised at common law in allowing or refusing bail, and which is said to have "ever been regarded with jealousy by a people tenacious of liberty." It is said that the liberty of the citizen was not intended to be left with no more reliable safeguard against its violation than the mere discretion of a Judge. That if the offense charged be capital in degree, then an inquiry must be directed to ascertain if the proof upon which it rests is evident or the presumption great. That if it appears upon such inquiry that the proof is not evident nor the presumption great, the right to be admitted to bail is absolute, even in such a case. But that, however this may be in regard to capital offenses, the expression of the Constitution with reference to cases below the capital degree is clear and unqualified that "all persons shall be bailable by sufficient sureties." That the case of Hoge does not involve a capital offense, and, therefore, he is "bailable by sufficient sureties." That this was his status before his late trial, and that his subsequent conviction of a minor felony does not alter the degree of the offense with which he is charged,

or constitute it one of a capital character; that the rule laid down by the Constitution upon the subject of bail refers only to the degree of the offense charged as being capital or less than capital, and was not intended to distinguish between cases pending for determination in the Supreme Court upon appeal, and like cases pending for determination in a Court of original criminal jurisdiction. I have sufficiently stated the argument to develop the point made and to show how it is said to bear upon the case in hand. The constitutional question thus presented is obviously of surpassing importance, and will be found to have divided the views of some of the highest Courts of the country. As it is already pending for decision in the Supreme Court of this State (*Ex Parte Voll*), and as, I think, the prisoner entitled to bail upon other grounds, I need not express my views upon it here nor particularly examine it further.

By statute concerning the writ of habeas corpus (Art. 2555), it is declared to be my duty to dispose of the prisoner "as the justice of the case may require;" and by another statute concerning admission to bail (Art. 1721), it is provided that in such a case as this in hand, bail may be allowed or refused "as a matter of discretion." This "discretion" to do "justice" is not, however, an arbitrary discretion to do abstract justice according to the popular meaning of that phrase, but is a discretion governed by legal rules to do justice according to law, or to the analogies of the law as near as may be. The case of the prisoner is almost within the very letter of the statute allowing bail upon appeal, for the offense of which he was convicted was one which might have been punished by the infliction of a fine merely. It was within the discretion of the Court to impose the fine or to adjudge the imprisonment. Either would have satisfied the statute which the prisoner had broken. Had the fine alone been imposed the positive rule of the statute would have permitted him to go upon bail pending an appeal.—(Art. 1721.) Yet his offense is the same, whether he be fined or be imprisoned. In case the mere fine had been imposed the statute itself set him at liberty on bail pending an appeal. Now that the imprisonment, however, has been adjudged, the statute leaves it to my discretion to admit him to bail or not, as justice may seem to require. If my discretion is to be interpreted by the rule of the statute in the other case, and I think it ought, I am unable to see why the prisoner prosecuting an appeal should absolutely go at large in the meantime in the

one case and absolutely go to the State Prison in the meantime in the other.

On the argument before me, attention was called to portions of the charge given to the jury on the trial of the prisoner, and also to the rulings of the Court in excluding certain evidence offered upon his behalf. It is not proper that I should intimate an opinion as to the ultimate determination of the points which it is the purpose of the appeal to present for the judgment of the Supreme Court. They are sufficient, in my judgment, to show that the appeal is bona fide, and that the case made is not to be characterized as frivolous or unsubstantial. I think that should I, under the circumstances, refuse to admit the prisoner to bail, it would be a misapplication of the discretion conferred by the statute. The right to appeal to the Supreme Court is guaranteed by the Constitution to the prisoner, and is as sacred as the right of trial by jury. It is one of the means the law has provided to determine the question of his guilt or innocence. Upon such an appeal the ultimate question is nearly always as to the validity of the judgment under which the prisoner is to suffer; and it is certainly not consonant to our ideas of justice, if it can be prevented by legal means, that even while the question of guilt or innocence is yet being agitated in the form of an appeal, the prisoner should be undergoing the very punishment and suffering the very infamy which it was the lawful purpose of the appeal to avert. It would be somewhat akin to a practice of punishing the accused for his alleged offense while the jury was yet deliberating upon the verdict.

Under the circumstances of this case, I shall order that the prisoner be admitted to bail, pending the appeal, in the sum of four thousand dollars.

WALLACE, J.

San Francisco, Nov. 23, 1870.

Nature of
bail.

1273. (§§ 513, 514.) If the offense is bailable, the defendant may be admitted to bail before conviction:

1. For his appearance before the magistrate on the examination of the charge, before being held to answer;

2. To appear at the Court to which the magistrate is required to return the depositions and statement, upon the defendant being held to answer after examination;

3. After indictment, either before the bench warrant is issued for his arrest or upon any order of the Court committing him or enlarging the amount of bail, or upon his being surrendered by his bail to answer the indictment in the Court in which it is found, or to which it may be transferred for trial. Same.

And after conviction, and upon an appeal:

1. If the appeal is from a judgment imposing a fine only, on the undertaking of bail, that he will pay the same, or such part of it as the appellate Court may direct, if the judgment is affirmed or modified, or the appeal is dismissed;

2. If judgment of imprisonment has been given, that he will surrender himself in execution of the judgment, upon its being affirmed or modified, or upon the appeal being dismissed.

1274. (§ 511.) When the admission to bail is a matter of discretion, the Court or officer to whom the application is made must require reasonable notice thereof to be given to the District Attorney of the county.

When bail is matter of discretion, notice of application must be given to District Attorney.

ARTICLE II.

BAIL UPON BEING HELD TO ANSWER BEFORE INDICTMENT.

SECTION 1277. What magistrates may admit to bail.

1278. Bail, how put in and form of the undertaking.

1279. Qualifications of bail.

1280. Bail, how to justify.

1281. On allowance of bail, [redacted] be discharged.

77. The Court in which a criminal indictment is pending has been authority to fix the amount of bail, irrespective of any action taken by the committing magistrate. *Ex parte Ryan*, 44 Cal. 51. The authority and discretion of a Court having jurisdiction of the magistrate should be exercised in admitting to bail, increasing or reducing the same, whenever substantial justice may be thereby prevented. *In corpus*. Party be committed for an alleged offense, and an indictment brought against him by a grand jury, in a proceeding as to increasing or reducing bail, he will be assumed to be guilty. *Id.*

What magistrates may admit to bail.

taking, executed by two sufficient persons (with or

Bail, how
put in and
form of the
undertak-
ing.

without the defendant, in the discretion of the magistrate), and acknowledged before the Court or magistrate, in substantially the following form:

An order having been made on the — day of —, A. D. eighteen —, by A. B., a Justice of the Peace of — County (or as the case may be), that C. D. be held to answer upon a charge of (stating briefly the nature of the offense), upon which he has been admitted to bail in the sum of — dollars; we, E. F. and G. H. (stating their place of residence and occupation), hereby undertake that the above named C. D. will appear and answer the charge above mentioned, in whatever Court it may be prosecuted, and will at all times hold himself amenable to the orders and process of the Court, and if convicted, will appear for judgment and render himself in execution thereof, or if he fails to perform either of these conditions, that we will pay to the people of the State of California the sum of — dollars (inserting the sum in which the defendant is admitted to bail.)

NOTE.—People vs. Smith, 18 Cal., p. 498. A substantial compliance with this section is sufficient.—People vs. Love, 19 Cal., p. 576. Bail is taken by a recognizance executed by sureties; the accused need not sign it.—People vs. Love, 19 Cal., p. 576. The bond need not state in what Court the defendant must appear.—People vs. Carpenter, 7 Cal., p. 402.

Qualifica-
tions of bail

1279. (§ 517.) The qualifications of bail are as follows:

1. Each of them must be a resident, householder, or freeholder within the State; but the Court or magistrate may refuse to accept any person as bail who is not a resident of the county where bail is offered;

2. They must each be worth the amount specified in the undertaking, exclusive of property exempt from execution; but the Court or magistrate, in taking bail, may allow more than two sureties to justify severally in amounts less than that expressed in the undertaking, if the whole justification be equivalent to that of sufficient bail.

NOTE.—Stats. 1855, p. 269, Sec. 1.

1280. (§§ 518, 519.) The bail must in all cases justify by affidavit taken before the magistrate, that they each possess the qualifications provided in the preceding section. The magistrate may further examine the bail upon oath concerning their sufficiency, in such manner as he may deem proper.

Bail, how to justify.

1281. Upon the allowance of bail and the execution of the undertaking, the magistrate must, if the defendant is in custody, make and sign an order for his discharge, upon the delivery of which to the proper officer the defendant must be discharged.

On allowance of bail, defendant to be discharged.

ARTICLE III.

BAIL UPON AN INDICTMENT BEFORE CONVICTION.

SECTION 1284. When offense is not capital.

1285. When the offense is capital.

1286. Bail on habeas corpus.

1287. Form of undertaking.

1288. Sections applicable to qualifications, etc.

1284. (§ 520.) When the offense charged in the indictment is not punishable with death, the officer serving the bench warrant must, if required, take the defendant before a magistrate in the county in which it is issued, or in which he is arrested, for the purpose of giving bail.

When offense is not capital.

NOTE.—The County Court is not fettered in its authority over the person of the defendant, after an indictment is found against him, by reason of any proceedings had against him previously. If bail has been previously taken, and is deemed sufficient security for the defendant's appearance, the Court may permit it to stand; if not deemed sufficient, the Court may order the defendant into custody, either for the purpose of procuring additional bail or for his detention until trial, if the case is one in which bail ought not to be taken. *Ex Parte Cook*, 35 Cal., p. 107.

1285. (§ 521.) If the offense charged in the indictment is punishable with death, the officer arrest-

When the offense is capital.

ing the defendant ~~must deliver~~ him into custody, according to the command of the bench warrant.

Bail on
habeas
corpus.

1286. (§ 522.) When the defendant is so delivered into custody he must be held by the Sheriff, unless admitted to bail on examination upon a writ of habeas corpus.

Form of
undertak-
ing.

1287. (§ 523.) The bail must be put in by a written undertaking, executed by two sufficient sureties (with or without the defendant, in the discretion of the Court or magistrate), and acknowledged before the Court or magistrate, in substantially the following form:

An indictment having been found on the — day of —, A. D. eighteen —, in the County Court of the County of —, charging A. B. with the crime of — (designating it generally), and he having been admitted to bail in the sum of — dollars, we, C. D. and E. F., of — (stating their place of residence and occupation), hereby undertake that the above named A. B. will appear and answer the indictment above mentioned, in whatever Court it may be prosecuted, and will at all times render himself amenable to the orders and process of the Court, and, if convicted, will appear for judgment and render himself in execution thereof; or, if he fails to perform either of these conditions, that we will pay to the people of the State of California the sum of — dollars (inserting the sum in which the defendant is admitted to bail.)

NOTE.—Stats. 1863, p. 162, Sec. 19; *People vs. Smith*, 18 Cal., p. 498. See note to Sec. 1278 of this Code. A party indicted for a bailable offense, and who is under arrest on a bench warrant on which an order is indorsed admitting the defendant to bail, is entitled to a discharge upon the execution of a proper recognizance. No approval of the recognizance is required, and the responsibility of the sureties attaches the moment the party is released; their liability is fixed by a breach of its conditions, and a forfeiture declared and entered by the proper Court. The justification forms no part of the contract, and in no manner affects the liability of the sureties.—*People vs. Penniman*, 37 Cal., p. 271.

1288. The provisions contained in section twelve hundred and seventy-nine, twelve hundred and eighty, and twelve hundred and eighty-one, in relation to bail before indictment, apply to bail after indictment.

Sections applicable to qualifications, etc.

~~Bail and incident thereto.~~

289. After a defendant has been admitted to bail on an indictment, the Court in which the indictment pending may, upon good cause shown, either increase or reduce the amount of bail. If the amount be increased, the Court may order the defendant to be committed to actual custody, unless he give bail in such increased amount. If application be made by the defendant for a reduction of the amount, notice of the order of application must be served upon the District Attorney. The Court admitting him to bail may, if it think proper, have the power to issue a writ of habeas corpus.

it is the duty of

Who may admit to bail.

NOTE.—Stats. 1851, p. 212. See, as to the right to bail on appeal, Sec. 1272 of this Code, and note.

1292. (§ 527.) The bail must possess the qualifications, and must be put in, in all respects, as provided in Article II of this Chapter, except that the undertaking must be conditioned as prescribed in Section 1273, for undertakings of bail on appeal.

Qualifications of bail and how put in, and condition of undertaking.

ARTICLE V.

DEPOSIT INSTEAD OF BAIL.

SECTION 1295. Deposit, when and how made.

1296. May, after bail is given and before forfeiture.

1297. Deposit to be applied to payment of judgment and fine.

1295. (§ 528.) The defendant, at any time after an order admitting him to bail, instead of giving bail may deposit with the Clerk of the Court in which he is held to answer, the sum mentioned in the order, and upon delivering to the officer in whose custody he is

Deposit, when and how made.

a certificate of the deposit, he must be discharged from custody.

May, after
bail is
given and
before
forfeiture.

1296. (§ 529.) If the defendant has given bail, he may, at any time before the forfeiture of the undertaking, in like manner deposit the sum mentioned in the recognizance, and upon the deposit being made the bail is exonerated.

Deposit to
be applied
to payment
of judg-
ment and
fine.

1297. (§ 530.) When money has been deposited, if it remains on deposit at the time of a judgment for the payment of a fine, the County Clerk must, under the direction of the Court, apply the money in satisfaction thereof, and after satisfying the fine and costs, must refund the surplus, if any, to the defendant.

ARTICLE VI.

SURRENDER OF THE DEFENDANT.

SECTION 1300. Surrender, by whom; when, and how made.

1301. By whom, etc., the defendant may be arrested for the purpose of a surrender.

1302. On a surrender, before forfeiture, money deposited to be refunded, etc.

Surrender,
by whom;
when, and
how made.

1300. (§§ 531, 532.) At any time before the forfeiture of their undertaking the bail may surrender the defendant in their exoneration, or he may surrender himself, to the officer to whose custody he was committed at the time of giving bail, in the following manner:

1. A certified copy of the undertaking of the bail must be delivered to the officer, who must detain the defendant in his custody thereon as upon a commitment, and by a certificate in writing acknowledge the surrender;

2. Upon the undertaking and the certificate of the officer, the Court in which the action or appeal is pending may, upon notice of five days to the District

Attorney of the county, with a copy of the undertaking and certificate, order that the bail be exonerated, and on filing the order and the papers used on the application, they are exonerated accordingly.

1301. (§ 533.) For the purpose of surrendering the defendant, the bail, at any time before they are finally discharged, and at any place within the State, may themselves arrest him, or by a written authority, indorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so.

By whom, etc., the defendant may be arrested for the purpose of a surrender.

1302. (§ 534.) If money has been deposited instead of bail, and the defendant, at any time before the forfeiture thereof, surrenders himself to the officer to whom the commitment was directed, in the manner provided in the last two sections, the Court must order a return of the deposit to the defendant, upon producing the certificate of the officer showing the surrender, and upon a notice of five days to the District Attorney, with a copy of the certificate.

On a surrender, before forfeiture, money deposited to be refunded, etc.

ARTICLE VII.

FORFEITURE OF THE UNDERTAKING OF BAIL OR OF THE DEPOSIT OF MONEY.

SECTION 1305. In what cases, and how ordered. When and how forfeiture may be discharged.

1306. Forfeiture to be enforced by action.

1307. Deposit, when forfeited, how disposed of.

1305. (§§ 535, 536.) If, without sufficient excuse, the defendant neglects to appear for arraignment or for trial or judgment, or upon any other occasion when his presence in Court may be lawfully required, or to surrender himself in execution of the judgment, the Court must direct the fact to be entered upon its minutes, and the undertaking of bail, or the money deposited

In what cases, and how ordered.

When and
how
forfeiture
may be
discharged.

instead of bail, as the case may be, is thereupon declared forfeited. But if at any time before the final adjournment of the Court, the defendant or his bail appear and satisfactorily excuse his neglect, the Court may direct the forfeiture of the undertaking or the deposit to be discharged upon such terms as may be just.

Forfeiture
to be
enforced by
action.

1306. (§ 537.) If the forfeiture is not discharged, as provided in the last section, the District Attorney may at any time after the adjournment of the Court proceed by action only against the bail upon their undertaking.

NOTE.—People vs. Carpenter, 7 Cal., p. 402.

Deposit,
when for-
feited, how
disposed of.

1307. (§ 538.) If, by reason of the neglect of the defendant to appear, money deposited instead of bail is forfeited, and the forfeiture is not discharged or remitted, the Clerk with whom it is deposited must, immediately after the final adjournment of the Court, pay over the money deposited to the County Treasurer.

ARTICLE VIII.

RECOMMITMENT OF THE DEFENDANT, AFTER HAVING GIVEN BAIL OR DEPOSITED MONEY INSTEAD OF BAIL.

SECTION 1310. In what cases.

1311. Contents of order.

1312. Defendant may be arrested in any county.

1313. If for failure to appear for judgment, defendant must be committed.

1314. If for other cause, he may be admitted to bail.

1315. Bail in such case, by whom taken.

1316. Form of the undertaking.

1317. Bail must possess what qualifications, and how put in.

In what
cases.

1310. (§ 539.) The Court to which the committing magistrate returns the depositions, or in which an indictment or appeal is pending, or to which a judgment on appeal is remitted to be carried into effect, may, by an order entered upon its minutes, direct the

arrest of the defendant and his commitment to the officer to whose custody he was committed at the time of giving bail, and his detention until legally discharged, in the following cases:

1. When, by reason of his failure to appear, he has incurred a forfeiture of his bail or of money deposited instead thereof;

2. When it satisfactorily appears to the Court that his bail, or either of them, are dead or insufficient, or have removed from the State;

3. Upon an indictment being found in the cases provided in Section 985.

1311. (§ 540.) The order for the recommitment of the defendant must recite generally the facts upon which it is founded, and direct that the defendant be arrested by any Sheriff, Constable, Marshal, or Policeman in this State, and committed to the officer in whose custody he was at the time he was admitted to bail, to be detained until legally discharged.

Contents of order.

1312. (§ 541.) The defendant may be arrested pursuant to the order, upon a certified copy thereof, in any county, in the same manner as upon a warrant of arrest, except that when arrested in another county the order need not be indorsed by a magistrate of that county.

Defendant may be arrested in any county.

1313. (§ 542.) If the order recites, as the ground upon which it is made, the failure of the defendant to appear for judgment upon conviction, the defendant must be committed according to the requirement of the order.

If for failure to appear for judgment, defendant must be committed.

1314. (§ 543.) If the order be made for any other cause, and the offense is bailable, the Court may fix the amount of bail, and may cause a direction to be inserted in the order that the defendant be admitted

If for other cause, he may be admitted to bail.

to bail in the sum fixed, which must be specified in the order.

Bail in such case, by whom taken.

1315. (§ 544.) When the defendant is admitted to bail, the bail may be taken by any magistrate in the county, having authority in a similar case to admit to bail, upon the holding of the defendant to answer before an indictment, or by any other magistrate designated by the Court.

1316. (§ 545.) When bail is taken upon the recommitment of the defendant, the undertaking must be in substantially the following form:

Form of the undertaking.

An order having been made on the — day of —, A. D. eighteen —, by the Court (naming it), that A. B. be admitted to bail in the sum of — dollars, in an action pending in that Court against him in behalf of the people of the State of California, upon an (information, presentment, indictment, or appeal, as the case may be), we, C. D. and E. F., of (stating their places of residence and occupation), hereby undertake that the above named A. B. will appear in that or any other Court in which his appearance may be lawfully required upon that (information, presentment, indictment, or appeal, as the case may be), and will at all times render himself amenable to its orders and process, and appear for judgment and surrender himself in execution thereof; or if he fails to perform either of these conditions, that we will pay to the people of the State of California the sum of — dollars (insert the sum in which the defendant is admitted to bail).

NOTE.—See note to Sec. 1278.

Bail must possess what qualifications, and how put in.

1317. (§ 546.) The bail must possess the qualifications, and must be put in, in all respects, in the manner prescribed in Article II of this Chapter.

CHAPTER II.

WHO MAY BE WITNESSES IN CRIMINAL ACTIONS.

SECTION 1321. Who are competent witnesses.

1322. When husband and wife are not competent witnesses.

1323. When the defendant is not a competent witness.

1321. The rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this Code. Who are competent witnesses.

NOTE.—These rules are found in the Code of Civil Procedure, and are as follows. (The numbers in parentheses refer to the sections of the old Practice Act):

SEC. 1879. (§ 391.) All persons, without exception, otherwise than are specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case, the credibility of the witness may be drawn in question, as provided in Section 1847.

SEC. 1880. (§ 394.) The following persons cannot be witnesses:

1. Those who are of unsound mind at the time of their production for examination;

2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

SEC. 1881. (§§ 395, 396, 397, 398, 399.) There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

1. A husband cannot be examined for or against his wife, without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other;

2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment;

3. A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs;

4. A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient;

5. A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure.

SEC. 1882. If a person offer himself as a witness, that is to be deemed a consent to the examination, also, of a wife, husband, attorney, clergyman, physician, or surgeon on the same subject, within the meaning of the first four subdivisions of the last section.

SEC. 1883. (§ 400.) The Judge himself, or any juror, may be called as a witness by either party; but in such case it is in the discretion of the Court or Judge to order the trial to be postponed or suspended, and to take place before another Judge or jury. See, also, note to Sec. 1102, ante, and cases there cited.

When husband and wife are not competent witnesses.

1322. Except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties.

NOTE.—People vs. Anderson, 26 Cal., p. 129. A restriction upon the competency of a witness must be strictly construed in favor of life, liberty, and public justice.—People vs. Awa, 27 Cal., p. 638.

When the defendant is not a competent witness.

1323. A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offer himself as a witness he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. His neglect or refusal to be a witness cannot in any manner prejudice him, nor be used against him on the trial or proceeding.

NOTE.—In *The People vs. Anderson*, July Term, 1870, says Justice Temple, speaking for the Court: “The defendant is not called upon to offer himself to prove any fact in the case, nor can any presumption be properly indulged against him for not doing so.” This Chapter is founded upon Secs. 13, 14, and 15, of the Crimes and Punishment Act of 1850, as they were subsequently amended (Stats. 1855, p. 105; 1863, p. 69); an Act authorizing husband and wife to become witnesses, etc. (Stats. 1866, p. 46); an Act relating to criminal prosecutions (*ib.*, p. 865); and an Act supplementary to the Crimes and Punishment Act of 1850 (Stats. 1868, p. 49). Kindred provisions were, under the former arrangement of our statutes, embodied in the Crimes and Punishment Act; but it is believed that their appropriate place is in that portion of the work relating to criminal procedure, hence the Commissioners so placed them. See note to Sec. 1102, and cases there cited.

CHAPTER III.

COMPELLING THE ATTENDANCE OF WITNESSES.

SECTION 1326. Subpœna defined, and who may issue.

1327. Form of subpœna.

1328. Subpœna, by whom and how served.

1329. Payment of the expenses of the witness when he is from without the county or is poor.

1330. Witness residing or served with subpœna out of the county, how compelled to attend.

1331. Disobedience to subpœna, etc.

1332. Failure to appear, undertaking forfeited.

1326. (§§ 547, 548, 549, 550, 551.) The process by which the attendance of a witness before a Court or magistrate is required is a subpœna; it may be signed and issued by:

Subpœna defined, and who may issue.

1. A magistrate before whom an information is laid, for witnesses in the State, either on behalf of the people or of the defendant;

2. The District Attorney, for witnesses in the State, in support of the prosecution, or for such other wit-

nesses as the Grand Jury, upon an investigation pending before them, may direct;

3. The District Attorney, for witnesses in the State, in support of an indictment, to appear before the Court in which it is to be tried;

4. The Clerk of the Court in which an indictment is to be tried; and he must, at any time, upon application of the defendant, and without charge, issue as many blank subpoenas, subscribed by him as Clerk, for witnesses in the State, as the defendant may require.

1327. (§§ 552, 553.) A subpoena authorized by the last section must be substantially in the following form:

Form of
subpoena.

The People of the State of California to A. B.:

You are commanded to appear before C. D., a Justice of the Peace of — Township, in — County (or as the case may be), at (naming the place), on (stating the day and hour), as a witness in a criminal action prosecuted by the people of the State of California against E. F.

Given under my hand this — day of —, A. D. eighteen —. G. H., Justice of the Peace, (or "J. K., District Attorney," or "By order of the Court, L. M., Clerk," or as the case may be). If books, papers, or documents are required, a direction to the following effect must be contained in the subpoena: "And you are required, also, to bring with you the following" (describing intelligibly the books, papers, or documents required).

Subpoena,
by whom
and how
served.

1328. (§§ 554, 555.) A subpoena may be served by any person, but a peace officer must serve in his county any subpoena delivered to him for service, either on the part of the people or of the defendant, and must, without delay, make a written return of the service, subscribed by him, stating the time and place of service. The service is made by showing the original to the witness personally and informing him of its contents.

1329. (§§ 556, 557.) When a person attends before a magistrate, Grand Jury, or Court, as a witness on behalf of the people, upon a subpoena or pursuant to an undertaking, and it appears that he has come from a place out of the county, or that he is poor, the Court, if the attendance of the witness be upon a trial, by an order upon its minutes, or, in any other case, the County Judge, by a written order, may direct the County Treasurer to pay the witness a reasonable sum, to be specified in the order, for his expenses. Upon the production of the order, or a certified copy thereof, the County Treasurer must pay the witness the sum specified therein, out of the County Treasury.

Payment of the expenses of the witness when he is from without the county or is poor.

1330. (§ 558.) No person is obliged to attend as a witness before a Court or magistrate out of the county where the witness resides or is served with the subpoena, unless the Judge of the Court in which the offense is triable, or a Justice of the Supreme Court, or a County Judge, upon an affidavit of the District Attorney or prosecutor, or of the defendant or his counsel, stating that he believes the evidence of the witness is material, and his attendance at the examination or trial necessary, shall indorse on the subpoena an order for the attendance of the witness.

Witness residing or served with subpoena out of the county, how compelled to attend.

1331. (§§ 559, 561.) Disobedience to a subpoena, or a refusal to be sworn or to testify as a witness, may be punished by the Court or magistrate as a contempt. A witness disobeying a subpoena issued on the part of the defendant, unless he show good cause for his non-attendance, is liable to the defendant in the sum of one hundred dollars, which may be recovered in a civil action.

Disobedience to subpoena, etc.

1332. (§ 560.) When a witness has entered into an undertaking to appear, upon his failure to do so the undertaking is forfeited in the same manner as undertakings of bail.

Failure to appear, undertaking forfeited.

1333 New Section

CHAPTER IV.

EXAMINATION OF WITNESSES CONDITIONALLY.

SECTION 1335. Witnesses to be examined conditionally for the defendant, as provided in this Chapter.

1336. In what cases defendant may apply for the order.

1337. Application, how made.

1338. Application, to whom made.

1339. Order, when granted and what to contain.

1340. On proof of service, if District Attorney be absent, examination must proceed.

1341. If facts on which order was founded be disproved, examination not to proceed.

1342. Attendance of witness, how enforced.

1343. Testimony, how taken and authenticated.

1344. Deposition to be transmitted to Clerk.

1345. When may be read in evidence. Subject to objections, etc.

Witnesses to be examined conditionally for the defendant, as provided in this Chapter.

1335. (§ 562.) When a defendant has been held to answer a charge for a public offense, he may, either before or after an indictment, have witnesses examined conditionally, on his behalf, as prescribed in this Chapter, and not otherwise.

In what cases defendant may apply for the order.

1336. (§ 563.) When a material witness for the defendant is about to leave the State, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial, the defendant may apply for an order that the witness be examined conditionally.

Application, how made.

1337. (§ 566.) The application must be made upon affidavit, stating:

1. The nature of the offense charged;
2. The state of the proceedings in the action;
3. The name and residence of the witness, and that his testimony is material to the defense of the action;
4. That the witness is about to leave the State, or is so sick or infirm as to afford reasonable grounds for apprehending that he will not be able to attend the trial.

1338. (§ 567.) The application may be made to the Court during the term thereof, or to the Judge in vacation, and must be upon three days notice to the District Attorney.

Application, to whom made.

1339. (§§ 568, 569.) If the Court or Judge is satisfied that the examination of the witness is necessary, an order must be made that the witness be examined conditionally, at a specified time and place, and that a copy of the order be served on the District Attorney, within a specified time before that fixed for the examination.

Order, when granted, and what to contain.

1340. The order must direct that the examination be taken before a magistrate named therein, and on proof being furnished to such magistrate of service upon the District Attorney of a copy of the order, if no counsel appear on the part of the people, the examination must proceed.

On proof of service, if District Attorney be absent, examination must proceed.

1341. If the District Attorney or other counsel appear on behalf of the people, and it is shown to the satisfaction of the magistrate, by affidavit or other proof, or on the examination of the witness, that he is not about to leave the State, or is not sick or infirm, or that the application was made to avoid the examination of the witness on the trial, the examination cannot take place; otherwise it must proceed.

If facts on which order was founded be disproved, examination not to proceed.

NOTE.—N. Y. Cr. Pr., Sec. 691.

1342. The attendance of the witness may be enforced by a subpoena, issued by the magistrate before whom the examination is to be taken.

Attendance of witness, how enforced.

NOTE.—N. Y. Cr. Pr., Sec. 697.

1343. The testimony given by the witness must be reduced to writing, and authenticated in the same manner as the testimony of a witness taken in support of an information.

Testimony, how taken and authenticated

NOTE.—N. Y. Cr. Pr., Sec. 692.

569 of this code is revised in Sec. 569 of the new code (as amended)

Deposition
to be trans-
mitted to
Clerk.

1344. The deposition taken must, by the magistrate, be sealed up and transmitted to the Clerk of the Court in which the action is pending or may come for trial.

When may
be read in
evidence.

1345. (§ 582.) The deposition, or a certified copy thereof, may be read in evidence by either party on the trial, upon its appearing that the witness is unable to attend, by reason of his death, insanity, sickness, or infirmity, or of his continued absence from the State. Upon reading the deposition in evidence, the same objections may be taken to a question or answer contained therein as if the witness had been examined orally in Court.

Subject to
objections,
etc.

NOTE.—See note at the end of succeeding Chapter.

~~1345 New Section added~~

~~1346 New Section .~~

CHAPTER V.

EXAMINATION OF WITNESSES ON COMMISSION.

SECTION 1349. Witness residing out of the State, when to be examined.

1350. When defendant may apply for an order to examine, etc.

1351. Commission defined.

1352. Application made on affidavit.

1353. Application, to whom made.

1354. Order for commission, when granted, and stay of proceedings.

1355. Interrogations, how settled and allowed.

1356. Direction as to the return of the commission.

1357. Commission, how executed. Copy of this section to be annexed to commission.

1358. Commission, how returned, when delivered to an agent for that purpose.

1359. Same.

1360. When and how filed.

1361. Commission and return to be open for inspection. Copies, etc.

1362. Depositions to be read in evidence. Objections thereto, etc.

1349. When an issue of fact is joined upon an indictment, the defendant may have any material witness, residing out of the State, examined in his behalf, as prescribed in this Chapter, and not otherwise.

Witness residing out of the State, when to be examined.

NOTE.—N. Y. Cr. Pr., Sec. 699.

1350. When a material witness for the defendant resides out of the State, the defendant may apply for an order that the witness be examined on a commission.

When defendant may apply for an order to examine, etc.

NOTE.—N. Y. Cr. Pr., Sec. 700.

1351. (§ 564.) A commission is a process issued under the seal of the Court and the signature of the Clerk, directed to some person designated as Commissioner, authorizing him to examine the witness upon oath on interrogatories annexed thereto, to take and certify the deposition of the witness, and to return it according to the directions given with the commission.

Commission defined

1352. (§ 566.) The application must be made upon affidavit, stating:

Application made on affidavit

1. The nature of the offense charged;
2. The state of the proceedings in the action, and that an issue of fact has been joined therein;
3. The name of the witness, and that his testimony is material to the defense of the action;
4. That the witness resides out of the State.

1353. (§ 567.) The application may be made to the Court during the term, or to the Judge in vacation, and must be upon three days' notice to the District Attorney.

Application, to whom made.

1354. (§§ 568, 569.) If the Court or Judge to whom the application is made is satisfied of the truth of the facts stated, and that the examination of the witness is necessary to the attainment of justice, an order must be made that a commission be issued to take his testimony; and the Court or Judge may insert in the order

Order for commission, when granted, and stay of proceedings.

a direction that the trial of the indictment be stayed for a specified time, reasonably sufficient for the execution and return of the commission.

Interrogations, how settled and allowed.

1355. (§§ 570, 571, 572, 573.) When the commission is ordered, the defendant must serve upon the District Attorney, without delay, a copy of the interrogatories to be annexed thereto, with two days' notice of the time at which they will be presented to the Court or Judge. The District Attorney may in like manner serve upon the defendant or his counsel cross-interrogatories, to be annexed to the commission, with the like notice. In the interrogatories either party may insert any questions pertinent to the issue. When the interrogatories and cross-interrogatories are presented to the Court or Judge, according to the notice given, the Court or Judge must modify the questions so as to conform them to the rules of evidence, and must indorse upon them his allowance and annex them to the commission.

Direction as to the return of the commission.

1356. (§ 574.) Unless the parties otherwise consent, by an indorsement upon the commission, the Court or Judge must indorse thereon a direction as to the manner in which it must be returned, and may, in his discretion, direct that it be returned by mail or otherwise, addressed to the Clerk of the Court in which the action is pending, designating his name and the place where his office is kept.

Commission, how executed.

1357. The Commissioner, unless otherwise specially rected, may execute the commission as follows:

1. He must publicly administer an oath to the witness that his answers given to the interrogatories shall be the truth, the whole truth, and nothing but the truth;
2. He must cause the examination of the witness to be reduced to writing, and subscribed by him;
3. He must write the answers of the witness as near as possible in the language in which he gives them, and read to him each answer as it is taken down, and correct or add to it until it conforms to what he declares is the truth;

4. If the witness decline answering a question, that fact, with the reason assigned by him for declining, must be stated; Same.

5. If any papers or documents are produced before him and proved by the witness, they, or copies of them, must be annexed to the deposition subscribed by the witness and certified by the Commissioner;

6. The Commissioner must subscribe his name to each sheet of the deposition, and annex the deposition, with the papers and documents proved by the witness, or copies thereof, to the commission, and must close it up under seal, and address it as directed by the indorsement thereon;

7. If there be a direction on the commission to return it by mail, the Commissioner must immediately deposit it in the nearest Post Office. If any other direction be made by the written consent of the parties or by the Court or Judge, on the commission as to its return, the Commissioner must comply with the direction.

A copy of this section must be annexed to the commission.

~~Section is made by the written consent of the parties, or by the Court or Judge, on the commission, as to its return, he must comply with the direction.~~

A copy of this section must be annexed to the commission.

Copy of this section to be annexed to commission.

1358. (§ 577.) If the commission and return is delivered by the Commissioner to an agent, he must deliver the same to the Clerk to whom it is directed, or to the Judge of the Court in which the indictment is pending, by whom it may be received and opened, upon the agent making affidavit that he received it from the hands of the Commissioner, and that it has not been opened or altered since he received it.

Commission, how returned, when delivered to an agent for that purpose.

1359. (§ 578.) If the agent is dead, or from sickness or other casualty unable personally to deliver the Same.

commission and return, as prescribed in the last section, it may be received by the Clerk or Judge from any other person, upon his making an affidavit that he received it from the agent; that the agent is dead, or from sickness or other casualty unable to deliver it; that it has not been opened or altered since the person making the affidavit received it; and that he believes it has not been opened or altered since it came from the hands of the Commissioner.

When and
how filed.

1360. (§§ 579, 580.) The Clerk or Judge receiving and opening the commission and return must immediately file it, with the affidavit mentioned in the last two sections, in the office of the Clerk of the Court in which the indictment is pending. If the commission and return is transmitted by mail, the Clerk to whom it is addressed must receive it from the Post Office, and open and file it in his office, where it must remain, unless otherwise directed by the Court or Judge.

Commis-
sion and
return to
be open for
inspection.
Copies, etc.

1361. (§ 581.) The commission and return must at all times be open to the inspection of the parties, who must be furnished by the Clerk with copies of the same or of any part thereof, on payment of his fees.

Depositions
to be read
in evidence

1362. (§ 582.) The depositions taken under the commission may be read in evidence by either party on the trial, upon it being shown that the witness is unable to attend from any cause whatever; and the same objections may be taken to a question in the interrogatories or to an answer in the deposition, as if the witness had been examined orally in Court.

Objections
thereto.

NOTE.—The two preceding Chapters embody the provisions of Secs. 582–582, inclusive, of the Criminal Practice Act (Stats. 1851, p. 212), extended to provide for taking depositions of persons out of the State. In *The People vs. Francis*, 38 Cal., p. 183, the Supreme Court held that under the sections cited, the defendant

could not take the deposition of any witness who resided out of the State. The same reason for a statutory enactment to meet such a case exists as for the provisions relating to taking testimony conditionally. As the law now stands, a defendant is unable to avail himself of the testimony of a witness residing in another State, even though that testimony is absolutely necessary to his exculpation.

CHAPTER VI.

INQUIRY INTO THE INSANITY OF THE DEFENDANT BEFORE TRIAL OR AFTER CONVICTION.

SECTION 1367. An insane person cannot be tried, sentenced, or punished for a public offense.

1368. When doubts arise as to sanity of the defendant, how determined. Stay of proceedings on.

1369. Order of the trial of the question of insanity. Charge of the Court.

1370. Verdict of the jury and proceedings thereon.

1371. If defendant is committed, it exonerates his bail, etc.

1372. Defendant detained in asylum until he becomes sane. Notice then given to District Attorney, etc.

1373. Expense of sending, etc., defendant to asylum, where chargeable.

1367. (§ 583.) A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane.

An insane person cannot be tried, sentenced, or punished for a public offense.

NOTE.—The words “an act done by a person in a state of insanity cannot be punished as a public offense,” which were in the original section, are omitted. They prescribed a rule by which responsibility was to be measured, and not a rule of criminal procedure, and for that reason are in substance incorporated in the first part of this Code. At common law one who had committed a capital offense, and who became insane before conviction, could not be arraigned; if he became insane after conviction, he could not be executed.—4 Black. Com., p. 24; 1 Wharton's Cr. Law, Sec. 53; see note to Sec. 1016, ante, *Insanity*, and cases there cited; also 1 Greenl. Ev., p. 42.

~~1368. (§§ 584, 585.) When an indictment is called for trial, if a doubt arises as to the sanity of the de-~~

When doubts arise as to sanity of the defendant, how determined

Stay of proceedings on.

Order of the trial of the question of insanity.

Charge of the Court.

Verdict of the jury and proceedings thereon.

1368. When an indictment is called for trial, or at any time during the trial, or when the defendant is brought up for judgment on conviction, if a doubt arises as to the sanity of the defendant, the Court must order the question as to his sanity to be submitted to a jury, and the trial of the indictment, or the pronouncing of the judgment, must be suspended until the question is determined by their verdict, and the trial jury may be discharged or retained, according to the discretion of the Court, during the tendency of the issue of insanity.

1369. (§§ 586, 587.) The trial of the question of insanity must proceed in the following order:

1. The counsel for the defendant must open the case and offer evidence in support of the allegation of insanity;

2. The counsel for the people may then open their case and offer evidence in support thereof;

3. The parties may then respectively offer rebutting testimony only, unless the Court, for good reason in furtherance of justice, permit them to offer evidence upon their original cause;

4. When the evidence is concluded, unless the case is submitted to the jury on either or both sides without argument, the counsel for the people must commence, and the defendant or his counsel may conclude the argument to the jury;

5. If the indictment be for an offense punishable with death, two counsel on each side may argue the cause to the jury, in which case they must do so alternately. In other cases the argument may be restricted to one counsel on each side;

6. The Court must then charge the jury, stating to them all matters of law necessary for their information in giving their verdict.

1370. (§§ 588, 589.) If the jury find the defendant sane, the trial of the indictment must proceed, or judgment may be pronounced, as the case may be. If

1370. If the jury find the defendant sane, the trial the indictment must proceed, or judgment may be pronounced, as the case may be. If the jury find the defendant insane, the trial or judgment must be suspended until he becomes sane, and the Court must order that he be in the meantime committed by the Sheriff to the State Insane Asylum, and that upon his becoming sane he be redelivered to the Sheriff.

1371. (§ 590.) The commitment of the defendant, as mentioned in the last section, exonerates his bail, or entitles a person, authorized to receive the property of the defendant, to a return of any money he may have deposited instead of bail.

If defendant is committed, it exonerates his bail, etc.

1372. (§ 591.) If the defendant is received into the Asylum, he must be detained there until he becomes sane. When he becomes sane, the Superintendent must give notice of that fact to the Sheriff and District Attorney of the county. The Sheriff must thereupon, without delay, bring the defendant from the Asylum, and place him in proper custody until he is brought to trial or judgment, as the case may be, or is legally discharged.

Defendant detained in asylum until he becomes sane. Notice then given to District Attorney, etc.

1373. (§ 592.) The expenses of sending the defendant to the Asylum, of keeping him there, and of bringing him back, are in the first instance chargeable to the county in which the indictment was found; but the county may recover them from the estate of the defendant, if he have any, or from a relative, town, city, or county bound to provide for and maintain him elsewhere.

Expense of sending, etc., defendant to asylum, where chargeable.

CHAPTER VII.

COMPROMISING CERTAIN PUBLIC OFFENSES BY LEAVE OF THE COURT.

SECTION 1377. Certain offenses for which the party injured has a civil action may be compromised.

1378. Compromise to be by permission of the Court. Order thereon to bar another prosecution.

1379. No public offense to be compromised except as herein provided.

Certain offenses for which the party injured has a civil action may be compromised.

1377. (§ 675.) When a defendant is held to answer on a charge of misdemeanor, for which the person injured by the act constituting the offense has a remedy by a civil action, the offense may be compromised as provided in the next section, except when it is committed:

1. By or upon an officer of justice, while in the execution of the duties of his office;
2. Riotously;
3. With an intent to commit a felony.

Compromise to be by permission of the Court.

1378. (§§ 676, 677.) If the party injured appears before the Court to which the depositions are required to be returned, at any time before trial, and acknowledges that he has received satisfaction for the injury, the Court may, in its discretion, on payment of the costs incurred, order all proceedings to be stayed upon the prosecution, and the defendant to be discharged therefrom; but in such case the reasons for the order must be set forth therein, and entered on the minutes. The order is a bar to another prosecution for the same offense.

Order thereon to bar another prosecution

No public offense to be compromised except as herein provided.

1379. (§ 678.) No public offense can be compromised, nor can any proceeding or prosecution for the punishment thereof upon a compromise be stayed, except as provided in this Chapter.

CHAPTER VIII.

DISMISSAL OF THE ACTION BEFORE OR AFTER INDICTMENT,
FOR WANT OF PROSECUTION OR OTHERWISE.

SECTION 1382. When action may be dismissed.

1383. Court may order action to be continued and discharge defendant from custody, when and how.

1384. If action dismissed, defendant to be discharged, etc.

1385. Court may, of own motion or on application of District Attorney, order action dismissed.

1386. Nolle prosequi abolished.

1387. Dismissal a bar in misdemeanor, but not in felony.

1382. (§§ 593, 594.) The Court, unless good cause to the contrary is shown, must order the prosecution or indictment to be dismissed, in the following cases:

When
action may
be
dismissed.

1. When a person has been held to answer for a public offense, if an indictment is not found against him at the next term of the Court at which he is held to answer;

2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial at the next term of the Court in which the indictment is triable, after it is found.

1383. (§ 595.) If the defendant is not indicted or tried, as provided in the last section, and sufficient reason therefor is shown, the Court may order the action to be continued from term to term, and in the meantime may discharge the defendant from custody on his own undertaking of bail for his appearance to answer the charge at the time to which the action is continued.

Court may
order
action to be
continued
and
discharge
defendant
from
custody,
when and
how.

1384. (§ 596.) If the Court directs the action to be dismissed, the defendant must, if in custody, be discharged therefrom; or if admitted to bail, his bail is exonerated, or money deposited instead of bail must be refunded to him.

If action
dismissed,
defendant
to be
discharged,
etc.

Court may,
of own
motion or
on
application
of District
Attorney.
order
action
dismissed.

1385. (§ 597.) The Court may, either of its own motion or upon the application of the District Attorney, and in furtherance of justice, order an action or indictment to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes.

Nolle
prosequi
abolished.

1386. (§ 598.) The entry of a nolle prosequi is abolished, and neither the Attorney General nor the District Attorney can discontinue or abandon a prosecution for a public offense, except as provided in the last section.

Dismissal a
bar in mis-
demeanor,
but not in
felony.

1387. (§ 599.) An order for the dismissal of the action, as provided in this Chapter, is a bar to any other prosecution for the same offense, if it is a misdemeanor; but it is not a bar if the offense is a felony.

CHAPTER IX.

PROCEEDINGS AGAINST CORPORATIONS.

SECTION 1390. Summons upon information, etc., against; by whom issued and when returnable.

1391. Form of summons.

1392. When and how served.

1393. Examination of the charge.

1394. Certificate of the magistrate, and return thereof with the depositions.

1395. If the magistrate certify that there is sufficient cause, Grand Jury to investigate, etc.

1396. Appearance and plea.

1397. Fine on conviction, how collected.

Summons
upon
informa-
tion, etc.,
against; by
whom
issued and
when
returnable

1390. Upon an information or presentment against a corporation, the magistrate must issue a summons, signed by him, with his name of office, requiring the corporation to appear before him, at a specified time and place, to answer the charge, the time to be not less than ten days after the issuing of the summons.

1391.. The summons must be substantially in the following form: Form of summons.

COUNTY OF (as the case may be).

The People of the State of California to the (naming the corporation):

You are hereby summoned to appear before me at (naming the place), on (specifying the day and hour), to answer a charge made against you upon the information of A. B. (or the presentment of the Grand Jury of the county, as the case may be), for (designating the offense generally).

Dated at the City (or Township) of —, this — day of —, eighteen —.

G. H., Justice of the Peace (or as the case may be).

1392. The summons must be served at least five days before the day of appearance fixed therein, by delivering a copy thereof and showing the original to the President or other head of the corporation, or to the Secretary, Cashier, or managing agent thereof. When and how served

1393. At the appointed time in the summons, the magistrate must proceed to investigate the charge in the same manner as in the case of a natural person, so far as these proceedings are applicable. Examination of the charge.

1394. After hearing the proofs, the magistrate must certify upon the depositions, either that there is or is not sufficient cause to believe the corporation guilty of the offense charged, and must return the deposition and certificate, as prescribed in Section 883. Certificate of the magistrate, and return thereof with the depositions.

1395. If the magistrate returns a certificate that there is sufficient cause to believe the corporation guilty of the offense charged, the Grand Jury may proceed thereon as in case of a natural person held to answer. If the magistrate certify that there is sufficient cause, Grand Jury to investigate, etc.

1396. If an indictment is found, the corporation may appear by counsel to answer the same. If it does Appearance and plea.

not thus appear, a plea ~~of not guilty~~ must be entered, and the same proceedings had thereon as in other cases.

Fine on
conviction,
how
collected.

1397. When a fine is imposed upon a corporation on conviction, it may be collected by virtue of the order imposing it, by the Sheriff of the county, out of its real and personal property, in the same manner as upon an execution in a civil action.

NOTE.—This Code makes no distinction between natural persons and corporations, in respect to the manner of commencing criminal actions; they must all be commenced alike, either by an information before a magistrate or by presentment of a Grand Jury, etc. But from the nature of things, a different mode must be provided for *bringing the case* of a corporation defendant before the magistrate or Grand Jury, and for their appearance and plea; hence this Chapter.

CHAPTER X.

ENTITLING AFFIDAVITS.

SECTION 1401. Affidavits defectively entitled, valid.

Affidavits
defectively
entitled,
valid.

1401. (§ 600.) It is not necessary to entitle an affidavit or deposition in the action, whether taken before or after indictment, or upon an appeal; but if made without a title, or with an erroneous title, it is as valid and effectual ~~for~~ ^{information} every purpose as if it were duly entitled, if it intelligibly refer to the proceeding, indictment, or appeal in which it is made.

CHAPTER XI.

ERRORS AND MISTAKES IN PLEADINGS AND OTHER PROCEEDINGS.

SECTION 1404. When not material.

When not
material.

1404. (§ 601.) Neither a departure from the form or mode prescribed by this Code in respect to any

pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right.

CHAPTER XII.

DISPOSAL OF PROPERTY STOLEN OR EMBEZZLED.

SECTION 1407. When it comes into the custody of the peace officer he must hold it subject to the order of the magistrate.

1408. Order for its delivery to owner.

1409. When it comes into the custody of the magistrate he must deliver it to owner.

1410. Court in which trial is had may order its delivery.

1411. If not claimed in six months to be delivered to County Treasurer.

1412. Receipt by officers for money, etc., taken from a person arrested for a public offense.

1413. Duties of persons having charge of police offices in incorporated cities or towns.

1407. (§ 602.) When property, alleged to have been stolen or embezzled, comes into the custody of a peace officer, he must hold it subject to the order of the magistrate authorized by the next section to direct the disposal thereof.

When it comes into the custody of the peace officer, he must hold it subject to the order of the magistrate.

1408. (§ 603.) On satisfactory proof of the ownership of the property, the magistrate before whom the information is laid, or who examines the charge against the person accused of stealing or embezzling it, must order it to be delivered to the owner, on his paying the necessary expenses incurred in its preservation, to be certified by the magistrate. The order entitles the owner to demand and receive the property.

Order for its delivery to owner.

1409. (§ 604.) If property stolen or embezzled comes into custody of the magistrate, it must be delivered to the owner on satisfactory proof of his title,

When it comes into the custody of the magistrate he must deliver it to owner.

and on his paying the necessary expenses incurred in its preservation, to be certified by the magistrate.

Court in which trial is had may order its delivery.

1410. (§ 605.) If the property stolen or embezzled has not been delivered to the owner, the Court before which a trial is had for stealing or embezzling it may, on proof of his title, order it to be restored to the owner.

If not claimed in six months to be delivered to County Treasurer.

1411. (§ 606.) If the property stolen or embezzled is not claimed by the owner before the expiration of six months from the conviction of a person for stealing or embezzling it, the magistrate or other officer having it in custody must, on the payment of the necessary expenses incurred in its preservation, deliver it to the County Treasurer, by whom it must be sold and the proceeds paid into the County Treasury.

Receipt by officers for money, etc., taken from a person arrested for a public offense.

1412. (§ 607.) When money or other property is taken from a defendant, arrested upon a charge of a public offense, the officer taking it must at the time give duplicate receipts therefor, specifying particularly the amount of money or the kind of property taken; one of which receipts he must deliver to the defendant and the other of which he must forthwith file with the Clerk of the Court to which the depositions and statement are to be sent. When such property is taken by a police officer of any incorporated city or town, he must deliver one of the receipts to the defendant, and one, with the property, at once to the Clerk or other person in charge of the police office in such city or town.

Duties of persons having charge of police offices in incorporated cities or towns.

1413. The Clerk in, or person having charge of, the Police Office in any incorporated city or town, must enter in a suitable book a description of every article of property alleged to be stolen or embezzled, and brought into the office or taken from the person

of a prisoner, and must attach a number to each article, and make a corresponding entry thereof.

CHAPTER XIII.

REPRIEVES, COMMUTATIONS, AND PARDONS.

SECTION 1417. Power of the Governor to grant reprieves, commutations, and pardons.

1418. His power in respect to convictions for treason. Duty of the Legislature in such cases.

1419. Governor to communicate to the Legislature reprieves, commutations, and pardons.

1420. Report of case, how and from whom required.

1421. Notice to District Attorney of application for pardon.

1422. Publication of notice.

1423. When two preceding sections are not applicable.

1417. The Governor has power to grant reprieves, commutations, and pardons, after conviction, for all offenses, except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to the regulations provided in this Chapter.

Power of the Governor to grant reprieves, commutations, and pardons.

NOTE.—Const., Art. V, Sec. 13. As to what constitutes a pardon, see *People vs. Bowen*, April Term, 1872. A pardon is an act of grace proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.—*U. S. vs. Wilson*, 7 Peters, p. 150. It is construed like a grant, most favorable to the grantee.—*Hunt's Case*, 5 Eng. (Ark.), p. 284; *Wyvil's Case*, 5 Co., p. 492; 2 Hawk. P. C., Sec. 13; *Jones vs. Harris*, 1 Strob., p. 160. It must correctly recite the offense, or it will be inoperative.—1 Wharton's Cr. Law, Sec. 765. A pardon obtained by fraud is void.—2 Hawkins P. C., p. 533, Secs. 8, 9; *Rex vs. Maddox*, 1 Sid., p. 430. Where the condition of the pardon is that the defendant shall leave the State, and he either does not leave, or having left returns, the original sentence revives, and may be enforced.—*Flavel's Case*, 8 W. & S., p. 197; *State vs. Chancellor*, 1 Strob., p. 347; *People vs. Potter*, 1 Parker C. C., p. 47; *Ex Parte Wells*, 18 How. U. S., p. 307.

1417. *People v. Bowen*, 43 Cal. 439.

But if the time for departure is specified in the pardon, it will not begin to run during sickness or incapacity.—People vs. James, 2 Caines, p. 57. A pardon with a condition precedent does not operate until the condition is performed.—1 Wharton's Cr. Law, Sec. 766; Flavel's Case, 8 W. & S., p. 197.

His power
in respect
to convictions for
treason.

Duty of the
Legislature
in such
cases.

1418. He may suspend the execution of the sentence upon a conviction for treason, until the case can be reported to the Legislature, at its next meeting, when the Legislature may either pardon or commute the sentence, direct the execution thereof, or grant a further reprieve.

NOTE.—Const., Art. V, Sec. 13.

Governor to communicate to the Legislature reprieves, commutations and pardons.

1419. He must communicate to the Legislature each case of reprieve, commutation, or pardon, stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the commutation, pardon, or reprieve.

NOTE.—Const., Art. V, Sec. 13.

Report of case, how and from whom required.

1420. When an application is made to the Governor for a pardon, he may require the Judge of the Court before which the conviction was had, or the District Attorney by whom the action was prosecuted, to furnish him, without delay, with a statement of the facts proved on the trial, and of any other facts having reference to the propriety of granting or refusing the pardon.

Notice to District Attorney of application for pardon.

1421. At least ten days before the Governor acts upon an application for a pardon, written notice of the intention to apply therefor, signed by the person applying, must be served upon the District Attorney of the county where the conviction was had, and proof, by affidavit, of the service must be presented to the Governor.

Publication of notice.

1422. Unless dispensed with by the Governor, a copy of the notice must also be published for thirty

days from the first publication, in a paper in the county in which the conviction was had.

1423. The provisions of the two preceding sections are not applicable:

When two preceding sections are not applicable.

1. When there is imminent danger of the death of the person convicted or imprisoned;
2. When the term of imprisonment of the applicant is within ten days of its expiration.

NOTE.—This Chapter is founded upon an Act prescribing the manner of applying for pardons (Stats. 1853, p. 270). The provisions of an Act to confer further powers upon the Governor of this State, in relation to the pardon of criminals (Stats. 1864, p. 356), and of the Act amendatory thereof (Stats. 1868, p. 111), and of an Act authorizing the Board of State Prison Directors to recommend the pardoning of convicts, etc. (Stats. 1868, p. 116), are intimately connected with the subject of prison discipline, and for that reason are, with considerable modification (for reasons there given), inserted in the part of this Code relating to the State Prison.

TITLE XI.

OF PROCEEDINGS IN JUSTICES' AND POLICE COURTS AND APPEALS TO THE COUNTY COURT.

CHAPTER I. *Proceedings in Justices' and Police Courts.* II. *Appeals to County Courts.*

CHAPTER I.

PROCEEDINGS IN JUSTICES' AND POLICE COURTS.

SECTION 1426. Proceedings must be commenced by complaint.

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1428. Minutes, how kept.

1429. The plea, and how put in.

SECTION 1430. Issue, how tried.

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1442. Verdict, when several defendants are tried together.

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1445. Proceedings on plea of guilty or on conviction.

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1449. Judgment, when to be rendered.

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1451. New trial, grounds of.

1452. Grounds of motion in arrest of judgment.

1453. Judgment to be entered in the minutes.

1454. If judgment of acquittal or imposing a fine only, defendant to be discharged.

1455. Judgment of imprisonment, how executed.

1456. Judgment that defendant be imprisoned until he pay a fine, how executed.

1457. Fines, disposition of.

1458. Defendant may be admitted to bail.

1459. Subpœnas.

1460. Entitling affidavits.

1461. "Police Courts" defined.

Proceed-
ings must
be com-
menced by
complaint.

1426. (§ 608.) All proceedings and actions before a Justice's or Police Court, for a public offense of which such Courts have jurisdiction, must be commenced by complaint under oath, setting forth the offense charged, with such particulars of time, place, person, and property as to enable the defendant to

understand distinctly the character of the offense complained of, and to answer the complaint.

NOTE.—The Penal Code of California works the same change in criminal actions which has been wrought by the Code of Civil Procedure in civil cases.—*People vs. King*, 27 Cal., p. 507. See *People vs. Cronin*, 34 Cal., p. 191.

1427. (§ 610.) If the Justice of the Peace, or Police Justice, is satisfied therefrom that the offense complained of has been committed, he must issue a warrant of arrest, which must be substantially in the following form :

When
warrant of
arrest must
issue.

COUNTY OF —.

The People of the State of California to any Sheriff, Constable, Marshal, or Policeman in this State:

Form of
warrant.

Complaint upon oath having been this day made before me — (Justice of the Peace or Police Justice, as the case may be), by C. D., that the offense of (designating it generally) has been committed, and accusing E. F. thereof; you are therefore commanded forthwith to arrest the above named E. F. and bring him before me forthwith, at (naming the place.)

See
20th Cal.,
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Witness my hand and seal at —, this — day of —, A. D. —. A. B.

NOTE.—Stats. 1851, p. 212. Where one Justice issues a warrant to arrest and bring before him a party charged with crime, the officer making the arrest may (when the Justice who issued the warrant is absent or unable to act) take the arrested party before some other Justice of the same county for examination, etc.—*Ex Parte Branigan*, 19 Cal., p. 133. And it is not necessary in such a case that the warrant should contain a direction to that effect.—*Id.* As to arrest without warrant in particular cases, see *People vs. Poole*, 27 Cal., p. 572.

1428. (§ 613.) A docket must be kept by the Justice of the Peace or Police Justice, or by the Clerk of the Courts held by them, if there is one, in which must be entered each action and the proceedings of the Court therein.

Minutes,
how kept.

NOTE.—*Ex Parte Branigan*, 19 Cal., p. 133.

The plea,
and how
put in.

1429. The defendant may make the same plea as upon an indictment, as provided in section ten hundred and sixteen. His plea must be oral, and entered in the minutes. If the defendant plead guilty, the Court may, before entering such plea, or pronouncing judgment, examine witnesses to ascertain the gravity of the offense committed; and if it appear to the Court that a higher offense has been committed than the offense charged in the complaint, the Court may order the defendant to be committed, or admitted to bail, to answer any indictment which may be found against him by the Grand Jury.

Issue, how
tried.

1430. (§§ 611, 614.) Upon a plea other than a plea of guilty, if the defendant does not demand a trial by jury, or an adjournment or change of venue is not granted, the Court must proceed to try the case.

Change of
venue,
when
granted.

1431. (§ 611.) If the action or proceeding is in a Justice's Court, a change of the place of trial may be had at any time before the trial commences:

1. When it appears from the affidavit of the defendant that he has reason to believe, and does believe, that he cannot have a fair and impartial trial before the Justice about to try the case, by reason of the prejudice or bias of such Justice, the cause must be transferred to another Justice of the same or an adjoining township;

2. When it appears from affidavits that the defendant cannot have a fair and impartial trial, by reason of the prejudice of the citizens of the township, the cause must be transferred to a Justice of a township where the same prejudice does not exist.

NOTE.—Stats. 1860, p. 71, Sec. 1. See notes to Secs. 1033, 1034, ante.

Subd. 1.—BIAS OR PREJUDICE OF JUSTICE.—In Courts of record the bias or prejudice of the Judge has been held not to constitute any legal incapacity to sit on the trial of a cause, nor to be a sufficient ground to authorize a change of the place of trial.—People vs. Williams, 24 Cal., p. 31; People vs. Shuler, 28 Cal.,

p. 490; *People vs. Mahoney*, 18 Cal., p. 180. But this is not applicable in its full extent to Justice's Courts; and, as is seen by the words of the section, change of place of trial may be had on account of bias or prejudice of justice. But error of Judge in previous trial is not evidence of bias or prejudice.—*People vs. Williams*, 24 Cal., p. 31; *People vs. Shuler*, 28 Cal., p. 490.

Subd. 2.—Generally, as to prejudice of citizens of township against prisoner, which would prevent his having a fair and impartial trial. For cases where affidavit was held insufficient see *People vs. Shuler*, 28 Cal., p. 490; *People vs. Graham*, 21 Cal., p. 261; *People vs. McCauley*, 1 Cal., p. 379. It would seem to be sufficient cause for changing venue if it appears that a jury could not be selected from a certain portion of the county who would give the prisoner a fair and impartial trial.—*People vs. Baker*, 1 Cal., p. 403.

Affidavits, on which a motion to change the place of trial in a criminal case is founded, must state the *facts and circumstances* from which the conclusion is deduced that a fair and impartial trial cannot be had in the county in which the indictment was found. A statement, in *general terms*, that a fair and impartial trial cannot be had, or a statement that the deponent verily *believes* that a fair and impartial trial cannot be had *on account* of popular excitement and false reports, is sufficient.—*The People vs. McCauley*, 1 Cal., p. 379.

Upon an application in a criminal case to change the place of trial, on the ground that a fair and impartial trial cannot be had in the county where the prisoner was indicted, it is insufficient to state in the affidavit that a jury cannot be selected from a certain *portion* of the county who would give the prisoner a fair and impartial trial.—*The People vs. Baker*, 1 Cal., p. 403. For prejudice of officers connected with that Court whose duty it is to summon jurors, etc., see *People vs. Shuler*, 28 Cal., p. 490.

1432. (§ 611.) When a change of the place of trial is ordered, the Justice must transmit to the Justice before whom the trial is to be had all the original papers in the cause, with a certified copy of the minutes of his proceedings; and upon receipt thereof, the Justice to whom they are delivered must proceed with the trial in the same manner as if the proceeding or action had been originally commenced in his Court.

Upon change of venue, papers, etc., must be transmitted.

Proceedings on change of venue.

NOTE.—Stats. 1860, p. 71, Sec. 1; see notes to Secs. 1035–1038, ante, inclusive.

Postpone-
ment of the
trial.

1433. (§ 611.) Before the commencement of a trial in any of the Courts mentioned in this Chapter, either party may, upon good cause shown, have a reasonable postponement thereof.

NOTE.—GOOD CAUSE FOR POSTPONEMENT.—Absence of counsel on account of sickness.—People vs. Logan, 4 Cal., p. 188. Absence of witness.—People vs. Dodge, 28 Cal., p. 445; People vs. Dias, 6 Cal., p. 249. Surprise.—People vs. Symonds, 22 Cal., p. 348; see Sec. 1052, ante, and note. It will be observed that this section (1433) differs from that providing for postponement of trial in Courts of record (Sec. 1052). The text of this section does not contain the words “by affidavit” after “shown,” and it seems that the Court may grant postponement without affidavits. On a motion for postponement, however, on account of absence of witnesses, it is necessary to show that due diligence has been used by defendant in his endeavors to procure the attendance of witnesses, and in preparing for the trial. People vs. Baker, 1 Cal., p. 403. As to what does not constitute due diligence, see People vs. Williams, 24 Cal., p. 31. It should appear that not only efforts have been made to find the absent witnesses, but also, if service of a subpoena has been made on him, that it was such kind of service as he was bound to obey.—People vs. Joselyn, 29 Cal., p. 562.

Defendant
to be
present.

1434. (§ 612.) The defendant must be personally present before the trial can proceed.

NOTE.—Plea of “not guilty” may be entered on minutes of Court in absence of prisoner.—See People vs. Thompson, 4 Cal., p. 238.

Jury trial,
when to be
demanded.

Formation
of the jury.

1435. (§ 614.) Before the Court hears any testimony upon the trial, the defendant may demand a trial by jury. The formation of the jury is provided for in Chapter I, Title III, Part I of THE CODE OF CIVIL PROCEDURE.

NOTE.—See Code Civil Procedure, Secs. 190–251, inclusive, and notes.

Challenger.

1436. (§ 615.) The same challenges may be taken by either party to the panel of jurors, or to any indi-

vidual juror, as on the trial of an indictment for a misdemeanor; but the challenge must in all cases be tried by the Court.

NOTE.—Challenges for actual as well as implied bias, in proceedings before Justices' and Police Courts, are to be tried by the Court, differing in this from Courts of record.—See Secs. 1078–1085, inclusive. As to what constitute good grounds for challenge, see Secs. 1058–1088, inclusive.

1437. (§ 616.) The Court must administer to the jury the following oath: “You do swear that you will well and truly try this issue between the People of the State of California and A. B., the defendant, and a true verdict render according to the evidence.”

Oath of jurors.

1438. (§ 617.) After the jury are sworn, they must sit together and hear the proofs and allegations of the parties, which must be delivered in public and in the presence of the defendant.

Trial, how conducted.

1439. (§ 618.) The Court must decide all questions of law which may arise in the course of the trial, but can give no charge with respect to matters of fact.

Court to decide questions of law, but not to charge in respect to matters of fact.

NOTE.—See Secs. 1124–1127, ante, inclusive. The same general principles as to these matters govern trials in Courts of record and Courts not of record.

1440. (§ 619.) After hearing the proofs and allegations, the jury may decide in Court, or may retire for consideration. If they do not immediately agree, an officer must be sworn to the following effect: “You do swear that you will keep this jury together in some quiet and convenient place; that you will not permit any person to speak to them, nor speak to them yourself, unless by order of the Court, or to ask them whether they have agreed upon a verdict; and that you will return them into Court when they have so agreed, or when ordered by the Court.”

Jury may decide in Court or retire.

Oath of officer on their retirement

NOTE.—See Sec. 1128, ante.

Verdict of jury, how delivered and entered.

1441. (§§ 620, 621.) The verdict of the jury must in all cases be general. When the jury have agreed on their verdict, they must deliver it publicly to the Court, who must enter, or cause it to be entered, in the minutes.

NOTE.—For definition of “general verdict,” see Sec. 1151. No special verdict is allowed in Justices’ Courts, differing in this respect from Courts of record.—See Secs. 1150, 1154, ante.

Verdict, when several defendants are tried together.

1442. (§ 622.) When several defendants are tried together, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment must be entered accordingly, and the case as to the rest may be tried by another jury.

NOTE.—See similar provision as to Courts of record, Sec. 1160, ante.

Jury, when to be discharged without a verdict.

1443. (§ 623.) The jury cannot be discharged after the cause is submitted to them, until they have agreed upon and rendered their verdict, unless for good cause the Court sooner discharges them.

NOTE.—See Secs. 1139, 1140, ante, for similar provision as to Courts of record.

If discharged, defendant may be tried again.

1444. (§ 624.) If the jury is discharged, as provided in the last section, the Court may proceed again to the trial, in the same manner as upon the first trial, and so on, until a verdict is rendered.

NOTE.—See similar provision relating to Courts of record, Sec. 1141, ante.

Proceedings on plea of guilty or on conviction.

1445. When the defendant pleads guilty, or is convicted, either by the Court or by a jury, the Court must render judgment thereon of fine or imprisonment, or both, as the case may be.

Judgment of fine may direct imprisonment

~~1446. (§ 626.) A judgment that the defendant pay a fine may also direct that he be imprisoned until~~

1446. A judgment that the defendant pay a fine, may also direct that he be imprisoned until the fine be satisfied, in the proportion of one day's imprisonment for every dollar of the fine. [Approved March 7, 1874; 60 days.]

1447. (§ 627.) When the defendant is acquitted, either by the Court or by the jury, he must be immediately discharged; and if the Court certify in the minutes that the prosecution was malicious or without probable cause, it may order the prosecutor to pay the costs of the action, or to give satisfactory security by a written undertaking, with one or more sureties, to pay the same within thirty days after the trial.

Defendant, on acquittal, to be discharged.

Order that prosecutor pay costs.

1448. (§ 628.) If the prosecutor does not pay the costs, or give security therefor, the Court may enter judgment against him for the amount thereof, which may be enforced in all respects in the same manner as a judgment rendered in a civil action.

Judgment against prosecutor for costs.

1449. After a plea or verdict of guilty, or after a verdict against the defendant, on a plea of a former conviction or acquittal, the Court must appoint a time rendering judgment, which must not be more than 9 days nor less than six hours after the verdict is rendered, unless the defendant waive the postponement. 3 postponed, the Court may hold the defendant to bail 0 appear for judgment. e

Judgment, when to be rendered.

1450. (§ 631.) At any time before judgment, defendant may move for a new trial or in arrest of judgment.

When defendant may move for a new trial or in arrest of judgment.

NOTE.—See Sec. 1182, similar provisions applying to Courts of record.

1451. (§ 632.) A new trial may be granted in the following cases :

New trial, grounds of.

1. When the trial has been had in the absence of the defendant, unless he voluntarily absent himself, with full knowledge that a trial is being had;

Same.

2. When the jury has received any evidence out of Court;

3. When the jury has separated without leave of the Court, after having retired to deliberate upon their verdict, or been guilty of any misconduct tending to prevent a fair and due consideration of the case;

4. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors;

5. When there has been error in the decision of the Court, given on any question of law arising during the course of the trial;

6. When the verdict is contrary to law or evidence;

7. When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial; but when a motion for a new trial is made upon this ground, the defendant must produce at the hearing the affidavits of the witnesses by whom such newly discovered evidence is expected to be given.

NOTE.—Stats. 1863, p. 162, Sec. 22. See Secs. 1179-1182, ante, inclusive, for similar provisions relating to Courts of record.

Grounds of motion in arrest of judgment.

1452. (§ 633.) The motion in arrest of judgment may be founded on any substantial defect in the complaint, and the effect of an arrest of judgment is to place the defendant in the same situation in which he was before the trial was had.

Judgment to be entered in the minutes.

1453. (§ 634.) If the judgment is not arrested, or a new trial granted, judgment must be pronounced at the time appointed and entered in the minutes of the Court.

If judgment of acquittal or imposing a fine only, defendant to be discharged.

1454. (§ 635.) If judgment of acquittal is given, or judgment imposing a fine only, without imprisonment for non-payment, and the defendant is not de-

tained for any other legal cause, he must be discharged as soon as the judgment is given.

1455. (§ 636.) When a judgment of imprisonment is entered, a certified copy thereof must be delivered to the Sheriff, Marshal, or other officer, which is a sufficient warrant for its execution.

Judgment of imprisonment, how executed. X

1456. (§ 637.) When a judgment is entered imposing a fine, or ordering the defendant to be imprisoned until the fine is paid, he must be held in custody during the time specified in the judgment, unless the fine is sooner paid.

Judgment that defendant be imprisoned until he pay a fine, how executed.

1457. (§§ 638, 639.) Upon payment of the fine, the officer must discharge the defendant, if he is not detained for any other legal cause, and apply the money to the payment of the expenses of the prosecution, and pay over the residue, if any, within ten days, to the County or City Treasurer, according as the offense is prosecuted in a Justice's or Police Court. If a fine is imposed, and paid before commitment, it must be applied as prescribed in this section.

Fines, disposition of.

1458. (§ 640.) The defendant, at any time after his arrest, and before conviction, may be admitted to bail. The provisions of this Code relative to bail are applicable to bail in Justices' or Police Courts.

Defendant may be admitted to bail.

NOTE.—See Secs. 1268 to 1317, ante.

1459. The Justice or Judge of either of the Courts mentioned in this Chapter may issue subpoenas for witnesses, as provided in Section 1326, and punish disobedience thereof, as provided in Section 1331.

Subpoenas.

1460. The provisions of Section 1401, in respect to entitling affidavits, are applicable to proceedings in the Courts mentioned in this Chapter.

Entitling affidavits.

"Police
Courts"
defined.

1461. The term "Police Courts," as used in this and the succeeding Chapter, includes Police Judges' Courts, Police Courts, and all Courts held by Mayors or Recorders in incorporated cities or towns.

CHAPTER II.

APPEALS TO COUNTY COURTS.

SECTION 1466. Appeals, when allowed.

1467. Appeals, how taken, heard, and determined.

1468. Statement on appeal.

1469. If new trial granted, in what Court had.

1470. Proceedings, if appeal is dismissed or judgment affirmed.

Appeals,
when
allowed.

1466. (§ 481.) Either party may appeal to the County Court of the county from a judgment of a Justice's or Police Court, ~~in like cases and for like cause as appeals may be taken to the Supreme Court; but~~ no appeal can be taken from a judgment of the Police Judge's Court of San Francisco, imposing a fine only of less than twenty dollars.

NOTE.—See People vs. Maguire, 26 Cal., p. 635.

Appeals,
how taken,
heard, and
determined

1467. (§ 482.) The appeal is taken, heard, and determined as provided in Title IX, Part II of this Code.

NOTE.—See Secs. 1235 to 1265, ante, inclusive.

Statement
on appeal.

1468. The appeal to the County Court from the judgment of a Justice's or Police Court is heard upon a statement of the case settled by the Justice or Police Judge, embodying such ~~findings~~ ^{findings} of the Court as are excepted to, which statement must be filed with and settled by the Court within five days after filing notice of appeal.

NOTE.—Stats 1858, p. 217, Sec. 3. On appeal to the County Court from a Justice's or Police Court, a statement is unnecessary if the pleadings and docket of the

magistrate show the error relied on.—People vs. Maguire, 26 Cal., p. 635. Appeal from Police Court of San Francisco.—See People vs. Maguire, 26 Cal., p. 635.

1469. If a new trial is granted upon appeal, it must be had in the County Court, except the appeal is from the Police Judge's Court of San Francisco, in which case a copy of the order granting a new trial must be remitted to that Court, and the trial had therein.

If new trial granted, in what Court had.

NOTE.—Stats. 1858, p. 217, Sec. 4; People vs. Maguire, 26 Cal., p. 635.

1470. If the appeal is dismissed or the judgment affirmed, a copy of the order of dismissal or judgment of affirmance must be remitted to the Court below, which may proceed to enforce its sentence.

Proceedings, if appeal is dismissed or judgment affirmed.

NOTE.—Stats. 1858, p. 217, Sec. 4.

TITLE XII.

OF SPECIAL PROCEEDINGS OF A CRIMINAL NATURE.

CHAPTER I. *Of the writ of habeas corpus.*

II. *Of Coroners' inquests and duties of Coroners.*

III. *Of search warrants.*

IV. *Proceedings against fugitives from justice.*

V. *Miscellaneous provisions respecting special proceedings of a criminal nature.*

CHAPTER I.

OF THE WRIT OF HABEAS CORPUS.

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1474. Application for, how made.

- SECTION 1475. By whom issued, and before whom returnable.
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Who may
prosecute
writ.

1473. Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of *habeas corpus*, to inquire into the cause of such imprisonment or restraint.
~~On restraint.~~

NOTE.—See generally as to jurisdiction in matters of *habeas corpus*.—Code of Civil Procedure, Secs. 33, note; 44, note.

OFFICE OF THE WRIT OF HABEAS CORPUS.—*Habeas corpus* is undoubtedly the proper remedy for every

unlawful imprisonment, both in civil and criminal cases; but an imprisonment is not unlawful in the sense of this rule merely because the process or order under which the party is held has been irregularly issued or is erroneous. Process which has been irregularly issued may be set aside by the Court or officer by whom it was issued, and erroneous judgments and orders may be reversed on appeal or writ of error. The writ of habeas corpus has not been given for the purpose of reviewing judgments or orders made by a Court, or Judge or officer acting within their jurisdiction. To put it to such a use would be to convert it into a writ of error, and confer upon every officer who has authority to issue the writ appellate jurisdiction over the orders and judgments of the highest judicial tribunals in the land. County Judges, though occupying an inferior position, and exercising an inferior jurisdiction, would be, by such a rule, empowered to review and practically reverse the judgments and orders of the District Courts, and of the Supreme Court itself, and also of the Federal Courts exercising jurisdiction within the State. Establish the doctrine that the judgments and orders of Courts may be reviewed on habeas corpus, upon the ground of error, and appeals for the correction of errors may be dispensed with in all cases in which the arrest or imprisonment of persons is allowed. Every criminal action, every civil action in which an arrest is given, and every proceeding for a contempt, could be brought to the Supreme Court by writs of habeas corpus. Not only that, but, as already suggested, inferior tribunals would be called upon to review the judgments of superior tribunals, and tribunals of equal grade to interfere and review each other's proceedings. Such a rule would render all judicial proceedings amorphous, and lead to the utmost confusion and disorder. It is well settled that habeas corpus can be put to no such use, and that its functions, where the party who has appealed to its aid is in custody under process, do not extend beyond an inquiry into the jurisdiction of the Court by which it was issued, and the validity of the process upon its face.—*People vs. Cassels*, 5 Hill, p. 167; *People vs. Sheriff of New York*, 7 Abbott, p. 96; *Ex Parte Gibson*, 31 Cal., p. 619; *Ex Parte McCullough*, 35 Cal., p. 101.

JURISDICTION.—By the Act of April 20th, 1852, the power of hearing and determining writs of habeas corpus is vested in the Judge of every Court of record in the State. The final determination is not that of a Court, but the simple order of a Judge, and is not

appealable from or subject to review.—In the *Matter of Perkins*, 2 Cal., p. 424. The Judiciary have jurisdiction by habeas corpus to investigate cases where a party is arrested as a fugitive from justice, escaped from another State.—In the *Matter of Manchester*, on habeas corpus, 5 Cal., p. 237.

Application
for, how
made.

1474. Application for the writ is made by petition, signed either by the party for whose relief it is intended, or by some person in his behalf, and must specify:

1. That the person in whose behalf the writ is applied for is imprisoned or restrained of his liberty, the officer or person by whom he is so confined or restrained, and the place where, naming all the parties, if they are known, or describing them, if they are not known;

2. If the imprisonment is alleged to be illegal, the petition must also state in what the alleged illegality consists;

3. The petition must be verified by the oath or affirmation of the party making the application.

By whom
issued, and
before
whom
returnable

1475. The writ of habeas corpus may be granted:

1. By the Supreme Court, or any Justice thereof, upon petition on behalf of any person restrained of his liberty in this State. When so issued, it may be made returnable before the Court or any Justice thereof, or before any District or County Court, or any Judge thereof;

2. By the District Courts, or a Judge thereof, upon petition on behalf of any person restrained of his liberty in their respective districts;

3. By the County Courts, or a Judge thereof, upon petition on behalf of any person restrained of his liberty in their respective counties.

NOTE.—See note to Sec. 1490, post. Although the Supreme Court may issue the writ of habeas corpus, its allowance in term time is not obligatory but rests in the sound legal discretion of the Court. To allow it may be obligatory upon the Judges in their individual

capacity.—Ex Parte Ellis, 11 Cal., p. 222. If the local Judge refuses to act, then resort may be had to officers out of the county.—Id.

ISSUANCE OF WRIT.—The writ should not issue to run out of the county, unless for good cause shown, as the absence, disability, or refusal to act of the local Judge, or other reason, showing that the object and reason of the law requires its issuance.—Ex Parte Ellis, on application for habeas corpus, 11 Cal., p. 222. *The Legislature can never have intended* that a party imprisoned, under sentence of conviction, for a misdemeanor, should have the privilege of selecting from the Judiciary of the whole State the individual to whom he prefers to make his application, however distant from the place of his detention, and compel the officer having him in charge to convey him at the expense of the county.—Ex Parte Ellis, 11 Cal., p. 222. Formerly the Supreme Court could exercise its appellate jurisdiction by means of the writ of habeas corpus.—People vs. Turner, 1 Cal., p. 143. Under the Constitution, as amended, the Supreme Court has original jurisdiction to issue writs of habeas corpus.—Tyler vs. Houghton, 25 Cal., p. 26. Second application for habeas corpus. The decision of one Court or Judge refusing to discharge a prisoner on habeas corpus is not a bar in another application for the same writ before another Judge or Court.—Matter of Edward Ring, 28 Cal., p. 247.

1476. Any Court or Judge authorized to grant the writ, to whom a petition therefor is presented, must, if it appear that the writ ought to issue, grant the same without delay.

Writ must be granted without delay.

1477. The writ must be directed to the person having custody of or restraining the person on whose behalf the application is made, and must command him to have the body of such person before the Court or Judge before whom the writ is returnable, at a time and place therein specified.

Writ, what to contain.

1478. If the writ is directed to the Sheriff or other ministerial officer of the Court out of which it issues, it must be delivered by the Clerk to such officer without delay, as other writs are delivered for service.

How served.

If it is directed to any other person, it must be delivered to the Sheriff, and be by him served upon such person by delivering the same to him without delay. If the person to whom the writ is directed cannot be found, or refuses admittance to the officer or person serving or delivering such writ, it may be served or delivered by leaving it at the residence of the person to whom it is directed, or by affixing it to some conspicuous place on the outside either of his dwelling house or of the place where the party is confined or under restraint.

Proceed-
ings upon
disobedi-
ence to the
writ.

1479. If the person to whom the writ is directed refuses, after service, to obey the same, the Court or Judge, upon affidavit, must issue an attachment against such person, directed to the Sheriff or Coroner, commanding him forthwith to apprehend such person and bring him immediately before such Court or Judge; and upon being so brought, he must be committed to the jail of the county until he makes due return to such writ, or is otherwise legally discharged.

Return,
what to
contain.

1480. The person upon whom the writ is served must state in his return, plainly and unequivocally:

1. Whether he has or has not the party in his custody, or under his power or restraint;

2. If he has the party in his custody or power, or under his restraint, he must state the authority and cause of such imprisonment or restraint;

3. If the party is detained by virtue of any writ, warrant, or other written authority, a copy thereof must be annexed to the return, and the original produced and exhibited to the Court or Judge on the hearing of such return;

4. If the person upon whom the writ is served had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ of habeas corpus, but has transferred such custody or

restraint to another, the return must state particularly to whom, at what time and place, for what cause, and by what authority such transfer took place;

5. The return must be signed by the person making the same, and, except when such person is a sworn public officer, and makes such return in his official capacity, it must be verified by his oath.

1481. The person to whom the writ is directed, if it is served, must bring the body of the party in his custody or under his restraint, according to the command of the writ, except in the cases specified in the next section.

Body must be produced when.

1482. When, from sickness or infirmity of the person directed to be produced, he cannot, without danger, be brought before the Court or Judge, the person in whose custody or power he is may state that fact in his return to the writ, verifying the same by affidavit. If the Court or Judge is satisfied of the truth of such return, and the return to the writ is otherwise sufficient, the Court or Judge may proceed to decide on

When hearing may proceed without production of the body.

83. Where a party is held in custody, under an order which is on its face, and which the Court had power to make, he cannot be discharged on *habeas corpus*, because of error in granting the order. *Ex parte Hartman*, 44 Cal. 32. Neither a Court nor Judge will, on *habeas corpus*, investigate or decide the question, whether a jury impaneled to try the prisoner was properly or legally discharged by the Court because of its inability to agree on a verdict. *Ex parte McMillin*, 41 Cal. 211. The omission of the name of a person alleged to have been murdered, in a commitment by a Justice of the Peace, is such a defect as will entitle the accused to be discharged on *habeas corpus*. *Ex parte Ball*, 42 Cal. 197. Errors or omissions made in the minutes in criminal cases, will not be reviewed on *habeas corpus*. *Ex parte Murray*, 43 Cal. 455. The Court will only inquire if the judgment, as rendered, be upon its face certain and definite in its result, so that it may be known what punishment the prisoner is to receive. *Id.* Questions of mere error cannot be inquired into on *habeas corpus*. *Ex parte Max*, 44 Cal. 579.

such arising from production of

writ Hearing on return. production of other arising

it or Proceedings on the hearing. introduction in

the return, or except to the sufficiency thereof, or to allege any fact to show either that his imprisonment

or detention is unlawful, or that he is entitled to his discharge. The Court or Judge must thereupon proceed in a summary way to hear such proof as may be produced against such imprisonment or detention, or in favor of the same, and to dispose of such party as the justice of the case may require, and have full power and authority to require and compel the attendance of witnesses, by process of subpoena and attachment, and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case.

NOTE.—It was held that it was the right and duty of the Supreme Court, on habeas corpus, to review the decisions of inferior Courts in cases of contempt, as well as in others.—*Ex Parte Rowe*, 7 Cal., p. 181.

RETURN OF WRIT.—Upon a return to a writ of habeas corpus, it is proper for the Court to look into the depositions taken before the committing magistrate, in order to ascertain whether there is probable cause to suppose that a felony has been committed by the prisoner.—*People vs. Smith*, 1 Cal., p. 9.

HEARING ON HABEAS CORPUS.—If, at the hearing on habeas corpus, the Warden of the prison has not a certified copy of the judgment in a criminal action in his hands, and it appears that a judgment authorizing the detention of the defendant was entered, a copy of which can be procured, the Judge or Court will give a reasonable time to procure such copy, and, if obtained, quash the writ.—*In Re Edward Ring*, 28 Cal., p. 247.

ISSUES OF FACT.—On habeas corpus it is not competent to retry issues of fact, or to review the proceedings of a legal trial.—*Ex Parte Bird*, 19 Cal., p. 130. The statement in an indictment of some offense known to the law is essential to the jurisdiction of the Court, and is, therefore, under well settled rules, a fact which may be inquired into upon habeas corpus.—*In Re Corryell*, 22 Cal., p. 178. The doctrine of *res adjudicata* does not apply to proceedings on habeas corpus.—*In Re Edward Ring*, 28 Cal., p. 247; *In Re Perkins*, 2 Cal., p. 424.

When
Court may
discharge
the party.

1485. If no legal cause is shown for such imprisonment or restraint, or for the continuation thereof, such Court or Judge must discharge such party from the custody or restraint under which he is held.

NOTE.—Where five females are brought before the Court on a return to a writ of habeas corpus, and the person in whose custody they are, neither shows nor claims any legal right to detain them, they will be discharged.—*Ex Parte The Queen of the Bay*, 1 Cal., p. 157.

1486. The Court or Judge, if the time during which such party may be legally detained in custody has not expired, must remand such party, if it appears that he is detained in custody: When to remand party.

1. By virtue of process issued by any Court or Judge of the United States, in a case where such Court or Judge has exclusive jurisdiction; or,

2. By virtue of the final judgment or decree of any competent Court of criminal jurisdiction, or of any process issued upon such judgment or decree.

NOTE.—*Subd. 1.*—See *Matter of Manchester*, 5 Cal., p. 23; also, note to Sec. 1548, post.

WHEN PRISONER WILL BE REMANDED.—If it appears on habeas corpus that the commitment to the State Prison, under which the prisoner is held, is void, and if it further appears that there is a valid judgment of imprisonment against the petitioner, rendered by a competent Court of criminal jurisdiction, of which a certified copy can be obtained, the Court or Judge will order the prisoner to be retained until a certified copy of the judgment has been obtained, or until a reasonable time has been allowed for that purpose, and then, if obtained, remand him.—*Ex Parte Gibson*, 31 Cal., p. 619.

ERRORS REACHED BY HABEAS CORPUS.—A prisoner committed on final process will not be discharged, on habeas corpus, by reason of defects in the judgment, unless the judgment is absolutely void. Mere errors, however flagrant, which only render a judgment voidable, cannot be inquired into under this writ.—*People vs. Smith*, 1 Cal., p. 9.

1487. If it appears on the return of the writ that the prisoner is in custody by virtue of process from any Court of this State, or Judge or officer thereof, such prisoner may be discharged in any of the following cases, subject to the restrictions of the last section: Grounds of discharge in certain cases.

Same.

1. When the jurisdiction of such Court or officer has been exceeded;

2. When the imprisonment was at first lawful, yet by some act, omission, or event which has taken place afterwards, the party has become entitled to a discharge;

3. When the process is defective in some matter of substance required by law, rendering such process void;

4. When the process, though proper in form, has been issued in a case not allowed by law;

5. When the person having the custody of the prisoner is not the person allowed by law to detain him;

6. Where the process is not authorized by any order, judgment, or decree of any Court, nor by any provision of law;

7. Where a party has been committed on a criminal charge without reasonable or probable cause.

• **NOTE.**—It has been suggested to omit the seventh subdivision, because there was no provision requiring magistrates to have the testimony taken down, and, therefore, the subdivision was inoperative. Instead of omitting the subdivision, the Commissioners have required the magistrate to reduce the testimony to writing. See Sec. 869.

Subd. 1.—Ex Parte Cook, 35 Cal., p. 108.

Subd. 4.—Ex Parte Cook, 35 Cal., p. 108. Where, on habeas corpus, the offense charged is so defectively set forth in the warrant of commitment that the party cannot be held thereunder, but it appears from the papers that he ought not to be discharged, the Judge hearing the application ought to hold the party for examination, and cause the complainant and witnesses to attend before him for that purpose.—Ex Parte Branigan, 19 Cal., p. 133. Where, upon application for discharge by habeas corpus, it appears that the prisoner, by virtue of a commitment in due form, is detained to answer an indictment pending in a criminal Court, the Court or Judge hearing the application may proceed to inquire whether the indictment charges any offense known to the law, and upon determining that it does not, may discharge the prisoner.—In Re Corryell, 22 Cal., p. 178. A party committed for refusing to answer

questions propounded to him as a witness, under an order that he stand committed till he answer the questions, will be discharged on habeas corpus where it appears that the suit has abated. There being no longer parties or subject matter before the Court, there is no longer a case in which the question can be asked. *Ex Parte Rowe*, 7 Cal., p. 175. In such a case the commitment should state that the Grand Jury were inquiring into a certain question, stating it; that the prisoner was sworn as a witness and certain questions asked him, stating them; that he refused to answer; that the facts were thereupon presented to the Court by the Grand Jury, and the prisoner required by the Court to answer, which being refused by the prisoner, he was committed for contempt. And this rule is based upon the power of an appellate Court to review, on habeas corpus, the proceedings of an inferior Court in cases of contempt.—*Ex Parte Rowe*, 7 Cal., p. 181.

1488. If any person is committed to prison, or is in custody of any officer on any criminal charge, by virtue of any warrant of commitment of a Justice of the Peace, such person must not be discharged on the ground of any mere defect of form in the warrant of commitment.

Not to be discharged for defect of form in warrant.

1489. If it appears to the Court or Judge, by affidavit or otherwise, or upon the inspection of the process or warrant of commitment, and such other papers in the proceedings as may be shown to the Court or Judge, that the party is guilty of a criminal offense, or ought not to be discharged, such Court or Judge, although the charge is defective or unsubstantially set forth in such process or warrant of commitment, must cause the complainant or other necessary witnesses to be subpoenaed to attend at such time as ordered, to testify before the Court or Judge; and upon the examination he may discharge such prisoner, let him to bail, if the offense be bailable, or recommit him to custody, as may be just and legal.

Court may examine witnesses and discharge, hold to bail, or recommit.

1490. When a person is imprisoned or detained in custody on any criminal charge, for want of bail,

Writ for purpose of bail.

such person is entitled to a writ of habeas corpus for the purpose of giving bail, upon averring that fact in his petition, without alleging that he is illegally confined.

NOTE.—There is no appeal from an order of a Judge admitting a party to bail under the provision of the Title relating to habeas corpus.—*People vs. Schuster*, 40 Cal., p. 627. Where it appeared on the return to a writ of habeas corpus that there was reasonable ground to believe that the prisoners were guilty of burning certain Indian lodges in the Napa Valley, and of killing several Indians and perpetrating other outrages, they were nevertheless admitted to bail, on the grounds, solely, that the District Courts had not as yet been organized, nor their terms fixed, nor the Judges appointed, and that there was no secure place in which the prisoners could be kept until they could be brought to trial. It seems, had not these reasons existed, the prisoners would have been remanded to the custody of the Sheriff.—*People vs. Smith*, 1 Cal., p. 9.

Judge may
take bail.

1491. Any Judge before whom a person who has been committed on a criminal charge may be brought on a writ of habeas corpus, if the same is bailable, may take an undertaking of bail from such person as in other cases, and file the same in the proper Court.

Judge,
when to
remand.

1492. If a party brought before the Court or Judge on the return of the writ is not entitled to his discharge, and is not bailed, where such bail is allowable, the Court or Judge must remand him to custody or place him under the restraint from which he was taken, if the person under whose custody or restraint he was is legally entitled thereto.

Person in
illegal,
may be
committed
to legal
custody.

1493. In cases where any party is held under illegal restraint or custody, or any other person is entitled to the restraint or custody of such party, the Judge or Court may order such party to be committed to the restraint or custody of such person as is by law entitled thereto.

1494. Until judgment is given on the return, the Court or Judge before whom any party may be brought on such writ may commit him to the custody of the Sheriff of the county, or place him in such care or under such custody as his age or circumstances may require.

Disposition of party, pending proceedings on return.

1495. No writ of habeas corpus can be disobeyed for defect of form, if it sufficiently appear therefrom in whose custody or under whose restraint the party imprisoned or restrained is, the officer or person detaining him, and the Court or Judge before whom he is to be brought.

Defect of form in the writ immaterial, when.

1496. No person who has been discharged by the order of the Court or Judge upon habeas corpus can be again imprisoned, restrained, or kept in custody for the same cause, except in the following cases:

Imprisonment after discharge, in what cases permitted.

1. If he has been discharged from custody on a criminal charge, and is afterwards committed for the same offense, by legal order or process;

2. If, after a discharge for defect of proof, or for any defect of the process, warrant, or commitment in a criminal case, the prisoner is again arrested on sufficient proof and committed by legal process for the same offense.

1497. When it appears to any Court, or Judge, authorized by law to issue the writ of habeas corpus, that any one is illegally held in custody, confinement, or restraint, and that there is reason to believe that such person will be carried out of the jurisdiction of the Court or Judge before whom the application is made, or will suffer some irreparable injury before compliance with the writ of habeas corpus can be enforced, such Court or Judge may cause a warrant to be issued, reciting the facts, and directed to the Sheriff, Coroner, or Constable of the county, commanding such officer to take such person thus held in custody,

Warrant may issue instead of writ, in certain cases.

confinement, or restraint, and forthwith bring him before such Court or Judge, to be dealt with according to law.

Warrant
may
include
person
charged
with illegal
detention.

1498. The Court or Judge may also insert in such warrant a command for the apprehension of the person charged with such illegal detention and restraint.

Warrant,
how
executed.

1499. The officer to whom such warrant is delivered must execute it by bringing the person therein named before the Court or Judge who directed the issuing of such warrant.

Return and
hearing on.

1500. The person alleged to have such party under illegal confinement or restraint may make return to such warrant as in case of a writ of habeas corpus, and the same may be denied, and like allegations, proofs, and trial may thereupon be had as upon a return to a writ of habeas corpus.

Party may
be dis-
charged or
remanded.

1501. If such party is held under illegal restraint or custody, he must be discharged; and if not, he must be restored to the care or custody of the person entitled thereto.

Writ and
process
may issue
and be
served at
any time.

1502. Any writ or process authorized by this Chapter may be issued and served on any day or at any time.

By whom
issued and
when
returnable

1503. All writs, warrants, process, and subpoenas authorized by the provisions of this Chapter must be issued by the Clerk of the Court, and, except subpoenas, must be sealed with the seal of such Court, and served and returned forthwith, unless the Court or Judge shall specify a particular time for any such return.

Where
returnable

1504. All such writs and process, when issued by order of a Judge, must be returned before him at the county seat, and there heard and determined.

1505. If any Judge, after a proper application is made, refuses to grant an order for a writ of habeas corpus, or if the officer or person to whom such writ may be directed, refuses obedience to the command thereof, he shall forfeit and pay to the person aggrieved a sum not exceeding five thousand dollars, to be recovered by action in any Court of competent jurisdiction.

Damages, by whom recovered, for failure to issue or obey the writ.

NOTE.—This Chapter is based upon the habeas corpus Act of 1850, and Acts amendatory thereof.—Stats. 1850, p. 334; 1854, p. 268; 1859, p. 15; 1863, p. 334.

CHAPTER II.

OF CORONERS' INQUESTS AND DUTIES OF CORONERS.

SECTION 1510. Coroner to summon jury to inquire into cause of death in certain cases.

1511. Jurors to be sworn.

1512. Witnesses to be summoned.

1513. Witnesses compelled to attend.

1514. Verdict of jury in writing. What to contain.

1515. Testimony in writing, and where filed.

1516. Exception.

1517. Coroner to issue warrant, when.

1518. Form of warrant.

1519. How served.

1510. When a Coroner is informed that a person has been killed, or has committed suicide, or has suddenly died under such circumstances as to afford a reasonable ground to suspect that his death has been occasioned by the act of another by criminal means, he must go to the place where the body is, cause it to be exhumed, if it has been interred, and summon not less than nine nor more than fifteen persons, qualified by law to serve as jurors, to appear before him forthwith, at the place where the body of deceased is, to inquire into the cause of the death.

Coroner to summon jury to inquire into cause of death in certain cases.

NOTE.—See Pol. Code, Secs. 4285, 4290, for general duties of Coroner.

Jurors to
be sworn.

1511. When six or more of the jurors attend, they must be sworn by the Coroner to inquire who the person was, and when, where, and by what means he came to his death, and into the circumstances attending his death; and to render a true verdict thereon, according to the evidence offered them, or arising from the inspection of the body.

Witnesses
to be
summoned.

1512. Coroners may issue subpoenas for witnesses, returnable forthwith, or at such time and place as they may appoint, which may be served by any competent person. They must summon and examine as witnesses every person who, in their opinion, or that of any of the jury, has any knowledge of the facts, and may summon a surgeon or physician to inspect the body and give a professional opinion as to the cause of the death.

Witnesses
compelled
to attend.

1513. A witness served with a subpoena may be compelled to attend and testify, or punished by the Coroner for disobedience, in like manner as upon a subpoena issued by a Justice of the Peace.

Verdict of
jury in
writing.

What to
contain.

1514. After inspecting the body and hearing the testimony, the jury must render their verdict and certify the same by an inquisition in writing, signed by them, and setting forth who the person killed is, and when, where, and by what means he came to his death; and if he was killed, or his death occasioned by the act of another, by criminal means, who is guilty thereof.

Testimony
in writing,
and where
filed.

1515. The testimony of the witnesses examined before the Coroner's jury must be reduced to writing by the Coroner, or under his direction, and forthwith filed by him, with the inquisition, in the office of the Clerk of the County Court of the county.

Exception.

1516. If, however, the person charged with the commission of the offense is arrested before the inquisition can be filed, the Coroner must deliver the same,

with the testimony taken, to the magistrate before whom such person may be brought, who must return the same, with the depositions and statement taken before him, to the office of the Clerk of the County Court of the county.

1517. If the jury find that the person was killed by another, under circumstances not excusable or justifiable by law, or that his death was occasioned by the act of another by criminal means, and the party committing the act is ascertained by the inquisition, and is not in custody, the Coroner must issue a warrant, signed by him, with his name of office, into one or more counties, as may be necessary for the arrest of the person charged.

Coroner to
issue
warrant,
when.

1518. The Coroner's warrant must be in substantially the following form:

Form of
warrant.

COUNTY OF —.

The People of the State of California, to any Sheriff, Constable, Marshal, or Policeman in this State:

An inquisition having been this day found by a Coroner's jury before me, stating that A. B. has come to his death by the act of C. D., by criminal means (or as the case may be, as found by the inquisition), you are therefore commanded forthwith to arrest the above named C. D., and take him before the nearest or most accessible magistrate in this county.

Given under my hand this — day of —, A. D. eighteen —.

E. F., Coroner of the County of —.

1519. The Coroner's warrant may be served in any county, and the officer serving it must proceed thereon, in all respects, as upon a warrant of arrest on an information before a magistrate, except that when served in another county it need not be indorsed by a magistrate of that county.

How
served.

NOTE.—The preceding Chapter is based upon Secs. 4 to 14, inclusive, of the Act of 1850 (Stats. 1850, p. 264), with the amendment of 1862 to Sec. 4 incorporated.—Stats. 1862, p. 521, Sec 1.

CHAPTER III.

OF SEARCH WARRANTS.

SECTION 1523. Search warrant defined.

1524. Upon what grounds it may issue.

1525. It cannot be issued but upon probable cause, etc.

1526. Magistrates must examine, on oath, complainant, etc.

1527. Depositions, what to contain.

1528. When to issue warrant.

1529. Form of warrant.

1530. By whom served.

1531. Officer may break open door, etc., to execute warrant.

1532. May break open door, etc., to liberate person acting in his aid.

1533. When warrant may be served in the night.

1534. Within what time warrant must be executed.

1535. Officer to give receipt for property taken.

1536. Property, how disposed of.

1537. Return of warrant and delivery of inventory of property taken.

1538. Copy of inventory, to whom delivered.

1539. Proceedings, if grounds of warrant are controverted.

1540. Property, when to be restored to person from whom it was taken.

1541. Depositions, warrant, etc., to be returned by magistrate to County Court.

1542. When magistrate may direct defendant to be searched in his presence.

Search
warrant
defined.

1523. (§ 642.) A search warrant is an order in writing, in the name of the people, signed by a magistrate, directed to a peace officer, commanding him to search for personal property, and bring it before the magistrate.

Upon what
grounds it
may issue.

1524. (§ 643.) It may be issued upon either of the following grounds:

1. When the property was stolen or embezzled; in which case it may be taken on the warrant, from any place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or from any person in whose possession it may be;

2. When it was used as the means of committing a

felony; in which case it may be taken on the warrant Same.
from the place in which it is concealed, or from the
possession of the person by whom it was used in the
commission of the offense, or from any person in whose
possession it may be;

3. When it is in the possession of any person with
the intent to use it as the means of committing a pub-
lic offense, or in the possession of another to whom he
may have delivered it for the purpose of concealing it
or preventing its being discovered; in which case it
may be taken on the warrant from such person, or from
any place occupied by him or under his control, or from
the possession of the person to whom he may have so
delivered it.

NOTE.—The provisions of Sec. 643 of the Criminal
Practice Act have been extended, to the end that a
search warrant may be issued to search for and take
property when it was used as the means of committing
a felony, or where it is in the possession of a person
with intent to use it in the commission of a felony, and
to kindred cases.—See, also, N. Y. Cr. Pr., Sec. 862;
see, particularly, Livingston's Crim. Code, p. 481, Art.
43, Rules 1, 6. In the higher class of crimes the testi-
mony is almost invariably circumstantial, and no class
of circumstances is more important, in cases of that
description, in detecting and punishing guilt than trac-
ing to the possession of the defendant property either
used as the means of committing the offense or intended
to be used for that purpose. It is now usually obtained
by the officers of justice by the assumption of a respon-
sibility on their part which has no express sanction of
law; and though they are rarely prosecuted for assum-
ing this responsibility, it is rather owing to the fact
that the accused party seldom escapes punishment than
to the legality of the act. The propriety of legalizing
the search for and seizure of property, under these cir-
cumstances, cannot admit of doubt. Mr. Livingston,
in his Criminal Code, in accordance with this idea, pro-
vided that search warrants may be issued to seize forged
instruments in writing, or counterfeited coin intended
to be passed, or the instruments or materials prepared
for making them, arms or munitions prepared for the
purpose of insurrection or riot, and weapons, imple-
ments, or other articles necessary to be produced on

the trial of one accused of a crime.—Liv. Crim. Code p. 481, Art. 43, Rules 1, 6.

It cannot be issued but upon probable cause, etc.

1525. (§ 644.) A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched.

NOTE.—Const., Art. I, Sec. 19.

Magistrates must examine, on oath, complainant, etc.

1526. (§ 645.) The magistrate must, before issuing the warrant, examine on oath the complainant, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them.

NOTE.—It is proper that great care should be exercised in the proceedings leading to the issuance of a search warrant, especially in view of its extension to cases mentioned in Sec. 1524.

Depositions, what to contain.

1527. (§ 646.) The depositions must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist.

When to issue warrant.

1528. (§ 647.) If the magistrate is thereupon satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a peace officer in his county, commanding him forthwith to search the person or place named, for the property specified, and to bring it before the magistrate.

Form of warrant.

1529. (§ 648.) The warrant must be in substantially the following form:

COUNTY OF —.

The People of the State of California to any Sheriff, Constable, Marshal, or Policeman in the County of —:

Proof, by affidavit, having been this day made before me by (naming every person whose affidavit has been taken), that (stating the grounds of the application, according to Section 1525, or, if the affidavit be not positive, that there is probable cause for believing

that—stating the ground of the application in the same manner), you are therefore commanded, in the day-time (or at any time of the day or night, as the case may be, according to Section 1533), to make immediate search on the person of C. D. (or in the house situated —, describing it or any other place to be searched, with reasonable particularity, as the case may be) for the following property: (describing it with reasonable particularity); and if you find the same or any part thereof, to bring it forthwith before me at (stating the place).

Given under my hand, and dated this — day of —, A. D. eighteen —.

E. F., Justice of the Peace (or as the case may be).

1530. (§ 640.) A search warrant may in all cases be served by any of the officers mentioned in its directions, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution. By whom served.

1531. (§ 650.) The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance. Officer may break open door, etc., to execute warrant.

1532. (§ 651.) He may break open any outer or inner door or window of a house, for the purpose of liberating a person who, having entered to aid him in the execution of the warrant, is detained therein, or when necessary for his own liberation. May break open door, etc., to liberate person acting in his aid.

1533. (§ 652.) The magistrate must insert a direction in the warrant that it be served in the day-time, unless the affidavits are positive that the property is on the person or in the place to be searched, in which case he may insert a direction that it be served at any time of the day or night. When warrant may be served in the night.

1534. (§ 653.) A search warrant must be executed and returned to the magistrate who issued it within Within what time warrant must be executed.

ten days after its date; after the expiration of this time the warrant, unless executed, is void.

Officer to
give
receipt for
property
taken.

1535. (§ 654.) When the officer takes property under the warrant, he must give a receipt for the property taken (specifying it in detail) to the person from whom it was taken by him, or in whose possession it was found; or, in the absence of any person, he must leave it in the place where he found the property.

Property,
how
disposed of.

1536. (§ 655.) When the property is delivered to the magistrate, he must, if it was stolen or embezzled, dispose of it as provided in Sections 1408 to 1413, inclusive. If it was taken on a warrant issued on the grounds stated in the second and third subdivisions of Section 1524, he must retain it in his possession, subject to the order of the Court to which he is required to return the proceedings before him, or of any other Court in which the offense in respect to which the property taken is triable.

Return of
warrant
and deliv-
ery of
inventory
of property
taken.

1537. (§ 656.) The officer must forthwith return the warrant to the magistrate, and deliver to him a written inventory of the property taken, made publicly or in the presence of the person from whose possession it was taken, and of the applicant for the warrant, if they are present, verified by the affidavit of the officer at the foot of the inventory, and taken before the magistrate at the time, to the following effect: "I, R. S., the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant."

Copy of
inventory,
to whom
delivered.

1538. (§ 657.) The magistrate must thereupon, if required, deliver a copy of the inventory to the person from whose possession the property was taken, and to the applicant for the warrant.

1539. (§§ 658, 659.) If the grounds on which the warrant was issued be controverted, he must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and authenticated in the manner prescribed in Section 869.

Proceedings, if grounds of warrant are controverted.

1540. (§ 660.) If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken.

Property, when to be restored to person from whom it was taken.

1541. (§ 661.) The magistrate must annex together the depositions, the search warrant and return, and the inventory, and return them to the next term of the County Court having power to inquire into the offenses in respect to which the search warrant was issued, at or before its opening on the first day.

Depositions, warrant, etc., to be returned by magistrate to County Court.

1542. (§ 664.) When a person charged with a felony is supposed by the magistrate before whom he is brought to have on his person a dangerous weapon, or anything which may be used as evidence of the commission of the offense, the magistrate may direct him to be searched in his presence, and the weapon or other thing to be retained, subject to his order, or to the order of the Court in which the defendant may be tried.

When magistrate may direct defendant to be searched in his presence.

NOTE.—This Chapter is based upon the sections of the Criminal Practice Act of 1851 referred to by the figures in parentheses.

CHAPTER IV.

PROCEEDINGS AGAINST FUGITIVES FROM JUSTICE.

SECTION 1547. Rewards for the apprehension of fugitives from justice.

1548. Fugitives from another State, when to be delivered up.

SECTION 1549. Magistrate to issue warrant.

1550. Proceedings for the arrest and commitment of the person charged.

1551. When and for what time to be committed.

1552. His admission to bail.

1553. Magistrate must notify District Attorney of the arrest.

1554. Duty of the District Attorney.

1555. Person arrested, when to be discharged.

1556. Magistrate to return his proceedings to the next County Court. Proceedings thereon.

1557. Fugitives from this State. Accounts of persons employed in procuring surrender to be paid out of the State Treasury.

1558. No fee or reward to be paid to or received by any public officer procuring the surrender of fugitives, etc.

Rewards
for the ap-
prehension
of fugitives
from
justice.

1547. The Governor may offer a reward, not exceeding one thousand dollars, payable out of the General Fund, for the apprehension:

1. Of any convict who has escaped from the State Prison; or,

2. Of any person who has committed, or is charged with the commission of, an offense punishable with death.

NOTE.—Founded upon the Act concerning rewards (Stats. 1851, p. 443).

Fugitives
from
another
State, when
to be deliv-
ered up.

1548. (§ 665.) A person charged in any State of the United States with treason, felony, or other crime, who flees from justice and is found in this State, must, on demand of the executive authority of the State from which he fled, be delivered up by the Governor of this State, to be removed to the State having jurisdiction of the crime.

NOTE.—Ex Parte James and George Watson, 2 Cal., p. 59. The former law was: "That a person charged in any State or Territory," etc. The word Territory has been omitted since the word State is defined in Subd. 18 of Sec. 7 of this Code so as to include Territory.—See Matter of Romain, 23 Cal., p. 591, where it was held that the omission of the word "Territory" in the Federal Constitution (Art. IV, Sec. 2) had the effect of limiting the application of the clause referring to "fugitives from justice from other States" to criminals fleeing from one "State" to another "State," and

not to those fleeing from a "Territory" to a State. Sec. 7 of this Code makes this section (1548) applicable to fugitives from Territories as well as States. In the Matter of Romain the Court say: "A question has been raised that Congress had no power to pass the Act relating to the rendition of fugitives from justice, and if they have, it is confined, under the provision in the National Constitution, to fugitives escaping from one 'State' to another 'State,' and does not extend to fugitives fleeing from a 'Territory.'" The clause of the National Constitution thus brought in question is as follows: "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." It will be noticed that Congress is not referred to in this clause, nor is any power over the matter conferred upon that body. In the same Article in which it is found several important subjects are treated of, over some of which power is conferred upon Congress, and in others not. Thus, in regard to the public acts, records, and judicial proceedings of the States, the admission of new States, the disposal of the territory and other property of the United States, and the guaranty of a republican form of government to each State, full power over these subjects is directly conferred upon Congress; but as to all other matters in that Article, including the clause in question, no power is conferred upon Congress. They stand as solemn compacts between the States, to be enforced by State legislation or by judicial action. They are, to a great extent, a recognition of rights founded upon principles of international law, but which were, under that law, often deemed more a matter of comity than of absolute right, except the provision respecting the rights of citizenship, which go beyond any rule of international law. Upon this very subject of the surrender of fugitives from justice fleeing from one State or nation to another, under the rules of international law, it has been a question very fully and ably discussed by public writers whether such surrender was a matter of right and duty or merely of comity.—Story on Conflict of Laws, Secs. 626-628. This was deemed too important a question to leave unsettled, and the framers of our national Constitution wisely inserted the clause referred to, making it no longer a matter of mere comity, subject to the pleasure of each State, but an absolute right and duty. This provision being a part of the supreme law of the

land, it is, a part of the law of each State, and State officers whose duty it is to adjudicate or execute the laws are governed by it the same as by every other law in force. A Court of general original jurisdiction, exercising the usual powers of a common law Court, is fully competent to hear and determine all matters, and to issue all necessary writs for the arrest and transfer of a fugitive criminal to the authorized agent of the State from whence he fled. Where a right is established by law, such Courts can apply the appropriate remedy and issue the necessary writs without special legislation. It may be considered doubtful whether the transfer of this power from the Courts to the Governor of the State is an act of wisdom. Certainly Courts of justice are more competent to adjudicate the difficult and perplexing questions which often arise in such cases than the Governor.—*Matter of Romaine*, 23 Cal. p. 589. *The Courts possess no power to control the executive discretion in surrendering fugitives from justice, nor can they compel a surrender in such case; yet, the Executive having acted, that discretion may be examined into in every case where the liberty of the subject is involved.*—*Matter of Manchester*, 5 Cal., p. 23. *The Governor of the State* issuing the requisition for the fugitive is the only proper judge of the authenticity of the affidavit, and the Judge, on habeas corpus, cannot go behind his action to inquire whether the affidavit was a forgery.—*Matter of Manchester*, 5 Cal., p. 23.

AFFIDAVIT.—It is not necessary that the affidavit upon which the requisition issued should set forth the crime charged, with all the legal exactness necessary to be observed in an indictment. If it distinctly charge the commission of an offense it is all that is necessary. In the *Matter of Manchester on Habeas Corpus*, 5 Cal., p. 23. It is not necessary that the affidavit should state that the prisoner is a “fugitive from justice.” The allegation that he committed the crime, and then secretly fled, is sufficient to deduce the conclusion that he is a fugitive from justice.—*Matter of Manchester*, 5 Cal., p. 23. The Judiciary have power to investigate on habeas corpus cases where a party is arrested as a fugitive from justice from another State.—*Matter of Manchester*, 5 Cal., p. 237.

1549. (§ 666.) A magistrate may issue a warrant for the apprehension of a person so charged, who flees from justice and is found in this State.

Magistrate
to issue
warrant.

NOTE.—See note to Sec. 1548.

1550. (§ 667.) The proceedings for the arrest and commitment of a person charged are, in all respects, similar to those provided in this Code for the arrest and commitment of a person charged with a public offense committed in this State, except that an exemplified copy of an indictment found, or other judicial proceedings had against him in the State in which he is charged to have committed the offense, may be received as evidence before the magistrate.

Proceed-
ings for the
arrest and
commit-
ment of the
person
charged.

1551. (§ 668.) If, from the examination, it appear that the accused has committed the crime alleged, the magistrate, by warrant reciting the accusation, must commit him to the proper custody in his county, for such time, to be specified in the warrant, as the magistrate may deem reasonable, to enable the arrest of the fugitive under the warrant of the Executive of this State, on the requisition of the executive authority of the State in which he committed the offense, unless he gives bail as provided in the next section, or until he is legally discharged.

When and
for what
time to be
committed

1552. (§ 669.) The magistrate may admit the person arrested to bail by an undertaking with sufficient securities, and in such sum as he deems proper, for his appearance before him at a time specified in the undertaking, and for his surrender to arrest upon the warrant of the Governor of this State.

His
admission
to bail.

1553. (§ 670.) Immediately upon the arrest of the person charged, the magistrate must give notice thereof to the District Attorney of the county.

Magistrate
must notify
District
Attorney of
the arrest.

1554. (§ 671.) The District Attorney must immediately thereafter give notice to the executive authority

Duty of the
District
Attorney.

of the State, or to the Prosecuting Attorney or presiding Judge of the Court of the city or county within the State having jurisdiction of the offense, to the end that a demand may be made for the arrest and surrender of the person charged.

Person
arrested,
when to be
discharged

1555. (§ 672.) The person arrested must be discharged from custody or bail, unless, before the expiration of the time designated in the warrant or undertaking, he is arrested under the warrant of the Governor of this State.

Magistrate
to return
his pro-
ceedings to
the next
County
Court.

Proceed-
ings
thereon.

1556. (§ 673.) The magistrate must return his proceedings to the next County Court of the county, which must thereupon inquire into the cause of the arrest and detention of the person charged, and if he is in custody, or the time for his arrest has not elapsed, it may discharge him from detention, or may order his undertaking of bail to be canceled, or may continue his detention for a longer time, or readmit him to bail, to appear and surrender himself within a time to be specified in the undertaking.

Fugitives
from this
State.

1557. (§ 674.) When the Governor of this State, in the exercise of the authority conferred by Section 2, Article IV of the Constitution of the United States, or by the laws of this State, demands from the executive authority of any State of the United States, or of any foreign Government, the surrender to the authorities of this State of a fugitive from justice, who has been found and arrested in such State or foreign Government, the accounts of the person employed by him to bring back such fugitive must be audited by the Board of Examiners, and paid out of the State Treasury.

Accounts of
persons em-
ployed in
procuring
surrender
to be paid
out of the
State
Treasury.

NOTE.—Stats. 1854, p. 169; State Const. Art. IV, Sec. 2. The fact that a fugitive from justice had not been heard of for sixteen months, and that he was a passenger on a particular vessel, and the vessel and

crew had never been heard from, is not sufficient to raise a legal presumption of his death.—Ashbury vs. Sanders, 8 Cal., p. 62.

1558. No compensation, fee, or reward of any kind can be paid to or received by a public officer of this State, or other person, for a service rendered in procuring from the Governor the demand mentioned in the last section, or the surrender of the fugitive, or for conveying him to this State, or detaining him therein, except as provided for in such section.

No fee or reward to be paid to or received by any public officer procuring the surrender of fugitives, etc.

NOTE.—N. Y. Cr. Pr., Sec. 907. This Chapter is designed to regulate a very important branch of criminal practice. The power to demand a fugitive from justice is one of the most delicate acts of sovereign authority, and should only be exercised in cases where the public welfare demands it. The cases in which its exercise is most frequently called for, though falling within the legal definition of public offenses, are rather of a private than a public character, such as false pretenses, and the like; and it is well known that the Executive has always been in the habit of scrutinizing them with great jealousy. And in these cases a large portion, if not a majority, of the applications for the exercise of this high prerogative on the part of the Governor are made, not directly by the public authorities, but by the private party on whose complaint the prosecution is instituted. They are informed, moreover, that it has been the practice of those who have filled the executive chair, in some, if not in all, instances of public prosecutions for this offense, to require that the party on whose application the requisition is granted bear the expense of its execution. This practice has no doubt proceeded upon the principle that these prosecutions are so far of a private character as to justify the Executive in imposing this condition, with a view to save the public treasury from an unnecessary burden. Whatever may be the reason for it, the Commissioners are constrained to believe that it should not exist. Its tendency is to convert the officer with whom the requisition is intrusted rather into a private than a public agent. It has frequently happened that the person to whom the requisition has been delivered has gone with it to a remote State on the strength of its possession, has negotiated for settlement of the debt out of the fraudulent contraction o

which it arose; and, holding it as a rod over the party, has wrung from his fears a compromise of the prosecution. Nor is this to be wondered at. Prosecutions of this nature seldom spring from the mere love of justice, but ordinarily are rather prompted by a spirit of revenge, or what is, perhaps, more frequently the case, of cupidity. The officer, therefore, who takes the requisition, at the expense of a private party, will naturally act for the promotion of the interests of his employer rather than from the mere desire to enforce, in his public relation, the process of the law. He will do this, from no motive corrupt in itself, perhaps, but because his own interests are equally involved in the success of a compromise with those of his employer. The Commissioners do not propose to restrict, in any degree, the discretion of the Executive, or the manner of its exercise, in this or any other criminal case. But, believing as they do, that the highest considerations of policy require the exclusion of every motive of private interest in the execution of this, more than in that of any other legal process, they propose by this Chapter that where a requisition is granted it shall be executed, as it is presumed to be issued, for the public good alone, and that the public treasury shall, therefore, answer for its execution; and that the officer to whom it is intrusted shall be prohibited, under the penalty of a misdemeanor (see Sec. 144), from receiving any compensation, fee, or reward for any act or service in respect to it, except as provided for in Sec. 1558.

CHAPTER V.

MISCELLANEOUS PROVISIONS RESPECTING SPECIAL PROCEEDINGS OF A CRIMINAL NATURE.

SECTION 1562. Parties to special proceedings, how designated.

1563. Entitling affidavits.

1564. Subpœnas.

Parties to
special pro-
ceedings,
how
designated

1562. The party prosecuting a special proceeding of a criminal nature is designated in this Code as the complainant, and the adverse party as the defendant.

Entitling
affidavits.

1563. The provisions of Section 1401, in respect to entitling affidavits, are applicable to such proceedings.

1564. The Courts and magistrates before whom Subpœnas. such proceedings are prosecuted may issue subpœnas for witnesses, and punish their disobedience in the same manner as in a criminal action.

TITLE XIII.

PROCEEDINGS FOR BRINGING PERSONS IMPRISONED IN THE STATE PRISON, OR THE JAIL OF ANOTHER COUNTY, BEFORE A COURT.

SECTION 1567. Persons imprisoned in the State Prison or the jail of another county, how brought before a Court.

1567. (§ 683.) When it is necessary to have a person imprisoned in the State Prison brought before any Court, or a person imprisoned in a County Jail brought before a Court sitting in another county, an order for that purpose may be made by the Court and executed by the Sheriff of the county where it is made.

Persons im-
prisoned in
the State
Prison or
the jail of
another
county, how
brought
before a
Court.

NOTE.—Stats. 1851, p. 212.

TITLE XIV.

DISPOSITION OF FINES AND FORFEITURES.

SECTION 1570. Fines and forfeitures, how disposed of.

1570. All fines and forfeitures collected in any Court, except Police Courts, must be applied to the payment of the costs of the case in which the fine is imposed or the forfeiture incurred; and after such costs are paid, the residue must be paid to the County Treasurer of the county in which the Court is held. [Approved March 30, 1874.]

Fines and
forfeitures,
how
disposed of.

residue must be paid to the County Treasurer of the county in which the Court is held.

NOTE.—Stats. 1851, p. 212.

NOTE.—The section numbers of Part II of this Code, "Criminal Procedure," placed thus: (§ 23), (§ 331), and so on, to many of the sections, indicate the sections of the original Act of May 1st, 1851, "Criminal Practice," which are retained for convenience in reference.

PART III.

OF THE STATE PRISON AND COUNTY JAILS.

PART III.

OF THE STATE PRISON AND COUNTY JAILS.

TITLE I.

OF THE STATE PRISON AND THE DISCHARGE OF PRISONERS THEREFROM BEFORE THEIR TERM OF SERVICE EXPIRES.

CHAPTER I. *Of the State Prison.*

II. *Of the discharge of prisoners before the expiration of their term of service.*

CHAPTER I.

OF THE STATE PRISON.

SECTION 1573. Under the charge and control of a Board of Directors.

1574. President pro tem of Senate, when to act as Director, etc.

1575. Compensation of Directors.

1576. Board must adopt rules and regulations.

1577. Board may appoint Warden and other officers.

1578. Duties of Clerk and other officers.

1579. Monthly reports of officers.

1580. Board must keep account of the funds received, etc., and report to the Governor.

1581. Persons convicted of offenses against the United States to be received in the prison.

1582. Disposition of insane prisoners.

1583. State Prison Fund.

SECTION 1584. State Prison Fund, how disbursed.

1585. Board cannot contract debts.

1586. Compensation of Sheriffs for transportation of convicts.

Under the charge and control of a Board of Directors.

1573. The State Prison is under the charge, control, and superintendence of a Board of Directors, consisting of the Governor, Lieutenant Governor, and Secretary of State.

President pro tem of Senate, when to act as Director, etc.

1574. In case of a vacancy in the office of Lieutenant Governor, the President pro tem of the Senate may perform the duties and receive the compensation provided for the Lieutenant Governor.

Compensation of Directors.

1575. The Board of Directors are to receive the sum of seventy-five dollars per month, each, for expenses incurred by them; in addition to which the Lieutenant Governor is paid the sum of ten dollars per day for each day's services rendered in the performance of any duty at the Prison.

Board must adopt rules and regulations

1576. The Board must adopt rules and regulations for the discipline of prisoners and the government of the prison, which rules must be printed, and copies thereof furnished to every officer appointed by the Board.

Board may appoint Warden and other officers.

1577. The Board may appoint a Warden, Clerk, and such other officers as may be necessary for the management and safe keeping of the prisoners.

Duties of Clerk and other officers.

1578. The Clerk must keep a record of the transactions of the Board, and he and the Warden and other officers appointed, must perform such other duties as are required by the Board or the rules and regulations adopted thereby.

Monthly reports of officers.

1579. The Warden and other officers appointed must make a monthly report to the Board, which must contain a statement of business done and transactions had in their several departments.

1580. The Board must keep correct accounts of all funds received from proceeds of convict labor, and appropriate such funds to the maintenance of the convicts and to the payment of prison expenses, and must make a full report to the Governor on the first Monday of each August next before the assembling of the Legislature, which report must contain a complete statement of the number and condition of the prisoners at the prison; the number and character of officers they have appointed, and the monthly pay received by each; the amount of expenses incurred, and for what; the amount and condition of personal property, belonging to the State, connected with the State Prison; and the actual condition of the buildings and property.

Board must keep account of the funds received, etc., and report to the Governor.

1581. The authorities of the State Prison must receive into the prison any person convicted of an offense against the United States, and keep such person in solitary confinement or at hard labor, or in confinement with or without hard labor, as provided in the order of the Court pronouncing sentence, until legally discharged, the United States supporting such convict, and paying the expenses of the execution of his sentence.

Persons convicted of offenses against the United States to be received in the prison.

1582. When the Physician, Warden, and Captain of the Yard of the State Prison, after an examination, are of opinion that any prisoner is insane, they must certify the fact under oath to the Governor, who may, in his discretion, order the removal of such prisoner to the Insane Asylum. As soon as the authorities of the asylum ascertain that such person is not insane, they must immediately notify the Warden of that fact, and thereupon the Warden must cause such prisoner to be at once returned to the prison, if his term of imprisonment has not expired.

Disposition of insane prisoners.

State
Prison
Fund.

1583. The moneys appropriated by the Legislature and the proceeds of the labor of prisoners constitute the State Prison Fund.

NOTE.—McCauley vs. Brook, 16 Cal., p. 11.

State
Prison
Fund, how
disbursed.

1584. The moneys in the State Prison Fund are applicable to the payment of the expenses of the prison, and the salaries of the Directors and officers thereof. The expenses and salaries must be audited and allowed by a Board of Examiners of State Prison accounts, consisting of the Attorney General, Treasurer, and Controller; after which, upon the order of the Board of Directors, the Controller must draw his warrant on the Treasurer therefor, and the Treasurer must pay the same out of such Fund.

Board
cannot
contract
debts.

1585. The Board of Directors cannot contract any debt or incur any liability binding upon the State.

NOTE.—The preceding Chapter is based upon the following Stats.: 1858, p. 259, Secs. 4, 5, 9, 10, 11, 12; 1860, p. 341, Sec. 1; 1864, p. 24, Sec. 1; 1868, p. 141, Sec. 1.

Compensa-
tion of
Sheriffs for
transporta-
tion of
convicts.

1586. Sheriffs must receive for prisoners delivered at the State Prison all expenses necessarily incurred in their transportation, and also a just and reasonable compensation for their own services, the amount of the expenses and compensation in each case to be audited and allowed by the Board of Examiners, and paid out of any moneys in the State Treasury appropriated for that purpose.

NOTE.—STATE PRISON MANAGEMENT GENERALLY. For decisions as to various questions concerning the State Prison, see opinions delivered in the following cases: McCauley vs. Weller, 12 Cal., p. 531; State of Cal. vs. McCauley, 15 Cal., p. 430; McCauley vs. Brook, 16 Cal., p. 11. For fees of Sheriff of San Bernardino County, see Stats. 1871-2, p. 494.

1586. Contracts for employment of convict labor. Porter v. Haight, 45 Cal. 631.

CHAPTER II.

87. The Board of Directors are hereby authorized required to contract for provisions, clothing, medicines, forage, fuel, and other supplies for the prison, any period of time not exceeding one year; and the contract shall be given to the lowest bidder at a letting thereof, if the price bid is a fair and reasonable one, and not greater than the usual market price. Each bid shall be accompanied by a sum in such penal sum as said Board shall determine, good and sufficient sureties, conditioned for the faithful performance of the terms of such contract. Contractors must be of the time, place, and conditions of letting at the Prison, the contract shall be given, for at least four consecutive regular weeks, in two daily newspapers in the cities of San Francisco and Sacramento; and also four insertions in any daily paper published in the county in which the prison is situated. If all the bids made at such letting seemed unreasonably high, the Board may, in their discretion, decline to contract, and may again advertise proposals, and may so continue to renew the advertisement until satisfactory contracts may be had; and in the meantime the Board may contract with any one whose offer may be regarded just and proper; but no contract thus made shall be let to run more than sixty days for each month of nine months; and no contract shall in any case extend beyond the public term as a whole. No bids shall be accepted, and a contract entered into in pursuance thereof, when such bid is higher than any other bid made at the same letting for the same article, and where a contract can be had at such a lower bid. When two or more bids for the same article are equal in amount, the Board may select the one of their refusal to contract, or may divide the contract between the bidders, as in their discretion may seem proper and right; provided, no contract shall be made or purchase made, where either of the Board, or any of the officers of the prison, is interested. All contracts or purchases made in violation of this section, shall be void. [Approved February 24th, 1874.]

Credits
for good
behavior,
how and
when
allowed.

§ 1590

Amended

Credits,
when
forfeited.

rejection by the Board of Directors, on appeal by the prisoner. Unless the Board, on appeal, at its first session thereafter, rejects the forfeiture, it is confirmed. Credits once forfeited cannot be restored except by the Board, and then only when circumstances render such restoration urgently necessary. The above provisions apply to all persons now imprisoned in the State Prison, and the commutation must be computed from April fourth, A. D. eighteen hundred and sixty-four.

NOTE.—Stats. 1867-8, p. 675, Sec. 1. The confirmation or rejection clause, as also that authorizing the Warden or Resident Director to adjudge the forfeiture, is a suggestion of Governor Holden.

Board to make rules and regulations to carry the provisions of this Chapter into effect.

1592. The Board may make such rules and regulations as may be necessary to carry into effect the provisions of this Chapter, and may declare and establish a proper scale or rate of debits and credits for good conduct or misconduct, which shall accompany the rules of discipline of the prison, and, in a book to be kept for that purpose, must cause to be entered up, at the end of each month, the result of credits to which each prisoner may be entitled, and on the first day of each month announce such result to the prisoners. Every contractor employing convict labor must keep a similar record of the conduct of all prisoners employed by him, and submit the same for inspection to the Board at the end of each month, who must take the same into consideration in making up their decision.

NOTE.—Stats. 1868-4, p. 356, Sec. 2.

Board, when to report credits to Governor.

1593. At the end of every month the Board must report to the Governor of this State the names of all prisoners whose terms of imprisonment are about to expire, by reason of the benefits of this Chapter, giving in such report the terms of their sentences, the date of imprisonment, the amount of total credits to the date of such report, and the date when their service would expire by limitation of sentence. The

Governor, at the expiration of the term for which any prisoner has been sentenced, less the number of days allowed and credited to him, must order the release of such prisoner, by an order under his hand addressed to the Warden of the prison, in such mode and form as he may deem proper, and with or without restoration to citizenship, according in his discretion.

NOTE.—Stats. 1867-8, p. 111, Sec. 1; 1863-4, p. 356, Secs. 4, 5.

1594. The Board must grant and enter up in favor of such prisoners whom they may deem worthy, by reason of good conduct and industry, during the twelve months prior to the fourth day of April, A. D. eighteen hundred and sixty-four, the credits authorized by Section 1590, not exceeding thirty days, the same to be deducted from the term of their imprisonment.

Further
powers of
the Board.

NOTE.—Stats. 1867-8, p. 675, Sec. 1.

1595. The Board must report to the Legislature, at each regular session, the names of any persons confined in the State Prison who, in their judgment, ought to be pardoned and set at liberty on account of good conduct or unusual terms of sentence, or any other cause which, in their opinion, should entitle such prisoners to a pardon. Whenever the Legislature, by a majority of both Houses, recommend to the Governor that any or all of the persons reported be pardoned by him, he may thereupon pardon such prisoners.

Board must
report.

Governor
may
pardon.

NOTE.—This Chapter embraces the provisions of an Act to confer further powers upon the Governor of this State in relation to the pardon of criminals, approved April 4, 1864 (Stats. 1863-4, p. 356); an Act to amend above cited Act, approved March 7, 1868 (Stats. 1867-8, p. 111); an Act to amend above cited Act, approved March 30, 1868 (Stats. 1867-8, p. 675); and an Act to authorize the Board of State Prison Directors to recommend the pardon of convicts in the State Prison, approved March 9, 1868 (Stats. 1867-8, p. 116).

TITLE II.

OF COUNTY JAILS.

SECTION 1597. County Jails, by whom kept and for what used.

1598. Rooms required in County Jails.

1599. Prisoners to be classified.

1600. Prisoners committed must be actually confined.

1601. Sheriff to receive prisoners committed by United States Courts.

1602. Sheriff or Jailer answerable for safe keeping of such prisoners.

1603. When jail of a contiguous county may be used.

1604. Keeper of Jail in contiguous county to receive prisoners.

1605. When jail in contiguous county to cease to be used.

1606. Prisoners to be returned to proper county.

1607. Prisoners may be removed in case of fire.

1608. Prisoners may be removed in case of pestilence.

1609. Papers served on Jailer for prisoner.

1610. Guard for jail.

1611. Sheriff to receive all persons duly committed.

1612. Prisoners on civil process, when not to be received.

1613. Prisoners may be required to labor.

1614. Rules and regulations for the performance of labor.

County
Jails, by
whom kept
and for
what used.

1597. The common jails in the several counties of this State are kept by the Sheriffs of the counties in which they are respectively situated, and are used as follows:

1. For the detention of persons committed in order to secure their attendance as witnesses in criminal cases;

2. For the detention of persons charged with crime and committed for trial;

3. For the confinement of persons committed for contempt, or upon civil process, or by other authority of law;

4. For the confinement of persons sentenced to imprisonment therein upon a conviction for crime.

1598. Each County Jail must contain a sufficient number of rooms to allow all persons belonging to either

one of the following classes to be confined separately and distinctly from persons belonging to either of the other classes:

Rooms
required
in County
Jails.

1. Persons committed on criminal process and detained for trial;

2. Persons already convicted of crime and held under sentence;

3. Persons detained as witnesses or held under civil process, or under an order imposing punishment for a contempt;

4. Males separately from females.

1599. Persons committed on criminal process and detained for trial, persons convicted and under sentence, and persons committed upon civil process, must not be kept or put in the same room, nor shall male and female prisoners (except husband and wife) be kept or put in the same room.

Prisoners
to be
classified.

1600. A prisoner committed to the County Jail for trial or for examination, or upon conviction for a public offense, must be actually confined in the jail until he is legally discharged; and if he is permitted to go at large out of the jail, except by virtue of a legal order or process, it is an escape.

Prisoners
committed
must be
actually
confined.

1601. The Sheriff must receive, and keep in the County Jail, any prisoner committed thereto by process or order issued under the authority of the United States, until he is discharged according to law, as if he had been committed under process issued under the authority of this State; provision being made by the United States for the support of such prisoner.

Sheriff to
receive
prisoners
committed
by United
States
Courts.

1602. A Sheriff, to whose custody a prisoner is committed, as provided in the last section, is answerable for his safe keeping in the Courts of the United States, according to the laws thereof.

Sheriff or
Jailer
answerable
for safe
keeping
of such
prisoners.

When jail
of a
contiguous
county may
be used.

1603. When there is no jail in the county, or when the jail becomes unfit or unsafe for the confinement of prisoners, the County Judge may, by a written appointment filed with the County Clerk, designate the jail of a contiguous county for the confinement of the prisoners of his county, or of any of them, and may at any time modify or annul the appointment.

NOTE.—Stats. 1851, p. 191.

Keeper of
jail in
contiguous
county to
receive
prisoners.

1604. A copy of the appointment, certified by the County Clerk, must be served on the Sheriff or Keeper of the jail designated, who must receive into his jail all prisoners authorized to be confined therein, pursuant to the last section, and who is responsible for the safe keeping of the persons so committed, in the same manner and to the same extent as if he was Sheriff of the county for whose use his jail is designated, and with respect to the persons so committed he is deemed the Sheriff of the county from which they were removed.

NOTE.—Stats. 1851, p. 191.

When
jail in
contiguous
county to
cease to be
used.

1605. When a jail is erected in the county for the use of which the designation was made, or its jail is rendered fit and safe for the confinement of prisoners, the County Judge of that county must, by a written revocation, filed with the County Clerk thereof, declare that the necessity for the designation has ceased, and that it is revoked.

Prisoners
to be
returned
to proper
county.

1606. The County Clerk must immediately serve a copy of the revocation upon the Sheriff of the county, who must thereupon remove the prisoners to the jail of the county from which the removal was had.

Prisoners
may be
removed in
case of fire.

1607. When a County Jail or a building contiguous to it is on fire, and there is reason to apprehend that the prisoners may be injured or endangered, the Sheriff or Jailer must remove them to a safe and con-

venient place, and there confine them as long as it may be necessary to avoid the danger.

1608. When a pestilence or contagious disease breaks out in or near a jail, and the physician thereof certifies that it is liable to endanger the health of the prisoners, the County Judge may, by a written appointment, designate a safe and convenient place in the county, or the jail in a contiguous county, as the place of their confinement. The appointment must be filed in the office of the County Clerk, and authorize the Sheriff to remove the prisoners to the place or jail designated, and there confine them until they can be safely returned to the jail from which they were taken.

Prisoners
may be
removed in
case of
pestilence.

1609. A Sheriff or Jailer upon whom a paper in a judicial proceeding, directed to a prisoner in his custody, is served, must forthwith deliver it to the prisoner, with a note thereon of the time of its service. For a neglect to do so he is liable to the prisoner for all damages occasioned thereby.

Papers
served on
Jailer for
prisoner.

1610. The Sheriff, when necessary, may, with the assent in writing of the County Judge, or in a city, of the Mayor thereof, employ a temporary guard for the protection of the County Jail, or for the safe keeping of prisoners, the expenses of which are a county charge.

Guard for
jail.

1611. The Sheriff must receive all persons committed to jail by competent authority, and provide them with necessary food, clothing, and bedding, for which he shall be allowed a reasonable compensation, to be determined by the Board of Supervisors, and, except as provided in the next section, to be paid out of the County Treasury.

Sheriff to
receive all
persons
duly
committed

1612. Whenever a person is committed upon process in a civil action or proceeding, except when the

Prisoners
on civil
process,
when not to
be received

people of this State are a party thereto, the Sheriff is not bound to receive such person, unless security is given on the part of the party at whose instance the process is issued, by a deposit of money, to meet the expenses for him of necessary food, clothing, and bedding, or to detain such person any longer than these expenses are provided for. This section does not apply to cases where a party is committed as a punishment for disobedience to the mandates, process, writs, or orders of Court.

NOTE.—The preceding Chapter is based upon the statutes of 1851, p. 191, Secs. 17, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 40, 42.

Prisoners
may be
required to
labor.

1613. Persons confined in the County Jail under a judgment of imprisonment rendered in a criminal action or proceeding, may be required by an order of the Board of Supervisors to perform labor on the public works or ways in the county.

Rules and
regulations
for the per-
formance
of labor.

1614. The Board of Supervisors making such order may prescribe and enforce the rules and regulations under which such labor is to be performed.

Approved February 14th, 1872.

NEWTON BOOTH,
Governor.

[Being alike applicable to all the Codes, there is here inserted:]

PART V.—POLITICAL CODE.

OF THE DEFINITION AND SOURCES OF LAW—EFFECT
AND PUBLICATION OF THE CODES, AND THE EX-
PRESS REPEAL OF STATUTES.

TITLE I. DEFINITION AND SOURCES OF THE LAW.

II. EFFECT OF THE CODES.

III. PUBLICATION OF THE CODES AND STATUTES
CONTINUED IN FORCE.

IV. EXPRESS REPEAL OF STATUTES.

TITLE I.

DEFINITION AND SOURCES OF THE LAW.

SECTION 4466. Definition of law.

4467. How expressed.

4468. Common law, when rule of decision.

4466. Law is a solemn expression of the will of the supreme power of the State. Definition
of law.

4467. The will of the supreme power is expressed: How
expressed.

1. By the Constitution;

2. By statutes.

4468. The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the Courts of this State. Common
law, when
rule of
decision.

NOTE.—Act of April 13, 1850; Stats. 1850, p. 219.

TITLE II.

EFFECT OF THE CODES.

SECTION 4478. Construction of the Codes with relation to the laws passed at the present session.

4479. Laws passed at present session prevail.

4480. Construction of Codes with relation to each other.

4481. Conflicts between Titles, which to prevail.

4482. Conflicts between Chapters, which to prevail.

4483. Conflicts between Articles, which to prevail.

4484. Conflicting sections of the same Title, which to prevail.

Construction of the Codes with relation to the laws passed at the present session.

4478. With relation to the laws passed at the present session of the Legislature, THE POLITICAL CODE, CIVIL CODE, CODE OF CIVIL PROCEDURE, and PENAL CODE, must be construed as though each had been passed on the first day of the present session.

Laws passed at present session prevail.

4479. If the provisions of any law passed at the present session of the Legislature contravene, or are inconsistent with, the provisions of either of the four Codes, the provisions of such law must prevail.

NOTE.—This section is but another form of stating the proposition contained in the preceding one. It is placed here, not because it is necessary, but to convey to the layman the idea which the preceding section conveys to the professional reader.

Construction of Codes with relation to each other.

4480. With relation to each other, the provisions of the four Codes must be construed (except as in the next two sections provided) as though all of such Codes had been passed at the same moment of time and were parts of the same statute.

Conflicts between Titles, which to prevail.

4481. If the provisions of any Title conflict with or contravene the provisions of another Title, the provisions of each Title must prevail as to all matters and questions arising out of the subject matter of such Title.

Conflicts between Chapters, which to prevail.

4482. If the provisions of any Chapter conflict with or contravene the provisions of another Chapter

of the same Title, the provisions of each Chapter must prevail as to all matters and questions arising out of the subject matter of such Chapter.

4483. If the provisions of any Article conflict with or contravene the provisions of another Article of the same Chapter, the provisions of each Article must prevail as to all matters and questions arising out of the subject matter of such Article.

Conflicts between Articles, which to prevail.

4484. If conflicting provisions are found in different sections of the same Chapter or Article, the provisions of the sections last in numerical order must prevail, unless such construction is inconsistent with the meaning of such Chapter or Article.

Conflicting sections of the same Title, which to prevail.

TITLE III.

PUBLICATION OF THE CODES.

SECTION 4494. Codes not published as part of the statutes.

4494. The Codes passed at this session of the Legislature must not be published as a part of the statutes passed at this session, but provision must be made by law for their publication.

Codes not published as part of the statutes

TITLE IV.

EXPRESS REPEAL OF STATUTES.

SECTION 4504. Repeal of repealed statutes not to imply that they were in force.

4505. Express repeal of statutes to be provided for.

4504. The repeal of any statute or part of a statute heretofore repealed must not be construed as a declaration, express or by implication, that such statute or

Repeal of repealed statutes not to imply that they were in force.

part of a statute has been in force at any time subsequent to such first repeal.

Express
repeal of
statutes to
be provided
for.

4505. The express repeal of statutes will be provided for by a separate statute, and such statute after its passage must be construed in the same manner and must have like effect as if it were part of this Code.

AN ACT providing for the Removal of Civil Officers, for a violation of Official Duties.

[Enacting Clause,]

SECTION 1. Any member of any Board of Directors, Board of Commissioners, or other Board of Officers, State, city, county, or district, or other person who has been elected or appointed, or who shall hereafter be elected or appointed to hold, control, build, or manage any public building of the State, or of any county, city, or city and county, in this State, or to hold, control, manage or disburse any of the public funds of this State, or of any county, city, or city and county in this State, or any person acting by, through, or under the authority of any such Board of Directors, Board of Commissioners, or other Board of Officers, or other persons, as aforesaid, or any other officer in the State who shall be guilty of a willful violation of any of the provisions of the statute under which he or they were, or may be hereafter elected or appointed, or of any other statute or statutes of this State prescribing or defining their duties and powers, or passed for their government and control, or who shall be guilty of any other willful violation of official duty, shall be deprived of his office, and otherwise punished, in accordance with the provisions of section two of this Act.

SEC. 2. Whenever any complaint in writing, duly verified by the oath of any complainant, shall be presented to the District Court, alleging that any of the officers, or other persons referred to in section one of this Act, have, within the jurisdiction of said Court, been guilty of a violation of the provisions of said section, or of any other statute or statutes of this State which have been, or may hereafter be, passed for their government and control, or prescribing or defining their duties and powers, it shall be the duty of said Court to cite the party or parties charged to appear before him on a certain day, not more than ten nor less than five days from the time when said complaint shall be presented; and on that day, or some subsequent day, not more than twenty days from that on which said complaint is presented, shall proceed to hear, in a summary manner, the complaint and evidence offered in support of the same, and the evidence offered by the party or parties complained of; and if in such hearing it shall appear that the charge or charges contained in said complaint are sustained, the Court shall enter a decree that said party or parties complained of shall be deprived of his or their office or position and shall enter judgment for one hundred dollars in favor of the complainant, and for such costs as are allowed in civil cases.

SEC. 3. This Act shall not be construed to repeal or impair the provisions of any other Act concerning officers in force at the time of the passage hereof, but shall be construed to be a cumulative remedy for the enforcement of official duty, and not otherwise.

[Approved March 30, 1874. Effect immediately.]

(Enacting Clause.)

SECTION 1. It shall not be lawful for any person or persons keeping a public house, saloon, or drinking place, either licensed or unlicensed, to sell, give away, or furnish spirituous or malt liquors, wine, or any other intoxicating beverages, on any part of any day set apart, or to be set apart, for any general or special election, by the citizens, in any election district or precinct in any of the counties within the State, where an election is in progress, during the hours when by law in said district or precinct the election polls are required to be kept open.

SEC. 2. Any person or persons violating the provisions of this Act, shall be deemed guilty of a misdemeanor.

SEC. 3. This Act shall take effect from and after its passage. [Approved March 7, 1874.]

NOTE.

In many of the notes to THE PENAL CODE it is said that the Acts of 1872, amendatory of Acts existing prior to the adoption of the Code, were *void* under Section 330 of the Political Code. This is an incorrect expression; the statutes so existing, as also the Acts of 1872, amendatory, etc., thereof, constitute the law for all purposes, prior to January 1st, 1873, when the Code goes into effect, and will remain the preëxisting law. The Code taking effect January 1st, 1873, supersedes them at that time, but they are not *void*.—EDS.

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